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### Contemporary Practice of the United States Relating to International Law (114:4 Am J Int'l L)

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## CONTEMPORARY PRACTICE OF THE UNITED STATES RELATING TO INTERNATIONAL LAW

EDITED BY JEAN GALBRAITH\*

***In this section:***

- U.S. Supreme Court Holds that the New York Convention Does Not Displace Domestic Doctrines Permitting Nonsignatories to Enforce Arbitration Agreements
- U.S. Supreme Court Rules that Victims of State-Sponsored Terrorism Can Sue Foreign States for Retroactive Punitive Damages Under the Foreign Sovereign Immunities Act
- Trump Administration Submits Notice of U.S. Withdrawal from the World Health Organization Amid COVID-19 Pandemic
- United States-Mexico-Canada Agreement Enters into Force
- President Trump Authorizes Economic Sanctions and Visa Restrictions Aimed at International Criminal Court
- United States Gives Notice of Withdrawal from Treaty on Open Skies

\* David Ta-wei Huang and Erica Rodarte contributed to the preparation of this section.

## GENERAL INTERNATIONAL AND U.S. FOREIGN RELATIONS LAW

*U.S. Supreme Court Holds that the New York Convention Does Not Displace Domestic Doctrines Permitting Nonsignatories to Enforce Arbitration Agreements*

doi:10.1017/ajil.2020.78

On June 1, 2020, the Supreme Court unanimously held that the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention or Convention) does not conflict with domestic equitable estoppel doctrines that permit the enforcement of arbitration agreements by nonsignatories. The Court interpreted the text of the Convention as being silent on the issue of enforcement by nonsignatories and thus leaving this issue to domestic law. The Court noted that some postratification practice (including the recommendation of a UN commission) and the views of the executive branch were consistent with its conclusion, but it did not determine how much weight should be accorded to these sources.

In 2007, two companies entered into three contracts whereby one would provide the other with certain steel manufacturing equipment.<sup>1</sup> All three contracts between the supplier and the purchaser included arbitration clauses stating: “[a]ll disputes arising between both parties in connection with or in the performances of the Contract[s] . . . shall be submitted to arbitration for settlement.”<sup>2</sup> The contracts further provided that this arbitration would take place in Germany.<sup>3</sup>

After the formation of these contracts, the supplier subcontracted with GE Energy Power Conversion France SAS, Corp. (GE Energy) for the “design, manufacture, and supply” of the motors for this equipment.<sup>4</sup> In 2016, the purchaser’s successor company, Outokumpu Stainless USA, LLC, sued GE Energy in Alabama state court, alleging that GE Energy’s motors had failed and resulted in substantial damages.<sup>5</sup> After removing the case to federal court, GE Energy filed a motion to dismiss and compel arbitration, invoking the arbitration clauses that were in the original three contracts.<sup>6</sup>

The federal district court granted this motion, but the U.S. Court of Appeals for the Eleventh Circuit reversed. It concluded that the original three contracts were sufficiently transnational in nature that their arbitration provisions could fall within the ambit of the New York Convention<sup>7</sup>—an international agreement that, while mostly focused on the recognition and enforcement of arbitral awards, also includes an article imposing certain obligations on states with respect to the recognition and enforcement of written arbitration agreements.<sup>8</sup> The Eleventh Circuit further found, however, that the arbitration provisions

<sup>1</sup> GE Energy Power Conversion France SAS, Corp. v. Outokumpu Stainless USA, LLC, 140 S. Ct. 1637, 1642 (2020).

<sup>2</sup> *Id.* (quoting the contracts) (first alteration in original).

<sup>3</sup> Outokumpu Stainless USA, LLC v. Convertteam SAS, 902 F.3d 1316, 1321 (11th Cir. 2018).

<sup>4</sup> GE Energy Power, *supra* note 1, at 1642.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> Outokumpu Stainless, *supra* note 3, at 1324–25 (reaching this finding in establishing subject matter jurisdiction).

<sup>8</sup> The United States ratified the New York Convention on September 30, 1970, and the Convention entered into force on December 29, 1970. See UN Commission on International Trade Law, Status: Convention on the

in the original three contracts did not give GE Energy a right to arbitration. In reaching this conclusion, it observed, as a subcontractor, GE Energy was “undeniably not a signatory to the [c]ontracts” and stated that the New York Convention “require[s] that the parties actually sign an agreement to arbitrate their disputes in order to compel arbitration.”<sup>9</sup> In essence, the Eleventh Circuit read the New York Convention as prohibiting GE Energy from invoking domestic equitable estoppel principles that might otherwise have provided it with a pathway to enforcing the arbitration provision despite its status as a nonsignatory.<sup>10</sup>

On June 1, 2020, the Supreme Court unanimously reversed the Eleventh Circuit. In an opinion authored by Justice Thomas, the Court held that the New York Convention does not conflict with domestic equitable estoppel doctrines allowing for the enforcement of arbitration by nonsignatories.<sup>11</sup> The Court reached this conclusion by using “familiar tools of treaty interpretation,” first considering the text of the treaty and then turning to other interpretive aids.<sup>12</sup>

With respect to text, the Court concluded that the language of the New York Convention was silent on the issue of enforcement by nonsignatories. Article II of the New York Convention provides:

1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.
2. The term “agreement in writing” shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.
3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.<sup>13</sup>

The Court read this language as meant only to “provide[] that arbitration agreements must be enforced in certain circumstances” but “not [to] prevent the application of domestic laws that are more generous in enforcing arbitration agreements.”<sup>14</sup> The Court stated:

The text of the New York Convention does not address whether nonsignatories may enforce arbitration agreements under domestic doctrines such as equitable estoppel.

Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958), at [https://uncitral.un.org/en/texts/arbitration/conventions/foreign\\_arbitral\\_awards/status2](https://uncitral.un.org/en/texts/arbitration/conventions/foreign_arbitral_awards/status2).

<sup>9</sup> *Outokumpu Stainless*, *supra* note 3, at 1326.

<sup>10</sup> *See id.* at 1326–37. Domestic equitable estoppel principles “allow[] a nonsignatory to a written agreement containing an arbitration clause to compel arbitration where a signatory to the written agreement must rely on the terms of that agreement in asserting its claims against the nonsignatory.” *GE Energy Power*, *supra* note 1, at 1644 (quoting RICHARD LORD, WILLISTON ON CONTRACTS § 57:19 (4th ed. 2001)).

<sup>11</sup> *GE Energy Power*, *supra* note 1, at 1648.

<sup>12</sup> *Id.* at 1644–45. The Court invoked its prior case law in identifying these tools and did not cite to the Vienna Convention on the Law of Treaties at any point in its analysis. *See id.* at 1645–48.

<sup>13</sup> Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Art. II, June 10, 1958, 21 UST 2517, 330 UNTS 38.

<sup>14</sup> *GE Energy Power*, *supra* note 1, at 1645.

The Convention is simply silent on the issue of nonsignatory enforcement, and in general, “a matter not covered is to be treated as not covered”—a principle “so obvious that it seems absurd to recite it.”<sup>15</sup>

The Court further observed that, “[g]iven that the Convention was drafted against the backdrop of domestic law, it would be unnatural to read Article II(3) to displace domestic doctrines in the absence of exclusionary language.”<sup>16</sup>

After discussing the Convention’s text, the Supreme Court looked to the “negotiation and drafting history of the treaty as well as ‘the postratification understanding’ of signatory nations” as “aids to its interpretation.”<sup>17</sup> As to the drafting history, the Court concluded that “[n]othing in [it] suggests that the Convention sought to prevent contracting states from applying domestic law that permits nonsignatories to enforce arbitration agreements in additional circumstances.”<sup>18</sup>

As to the postratification understanding, the Court observed that the “courts of numerous contracting states permit enforcement of arbitration agreements by entities who did not sign an agreement” and noted that at least one state—Peru—has legislation to this effect as well.<sup>19</sup> The Court also observed that “GE Energy points to a recommendation issued by the United Nations Commission on International Trade Law that, although not directly addressing Article II(3), adopts a nonexclusive interpretation of Article II(1) and (2).”<sup>20</sup> In reference to these sources, the Court stated:

These sources, while generally pointing in one direction, are not without their faults. The court decisions, domestic legislation, and UN recommendation relied on by the parties occurred decades after the finalization of the New York Convention’s text in 1958. This diminishes the value of these sources as evidence of the original shared understanding of the treaty’s meaning. Moreover, unlike the actions and decisions of signatory nations, we have not previously relied on UN recommendations to discern the meaning of treaties.

The Court nonetheless concluded that “to the extent this evidence is given any weight, it confirms our interpretation of the Convention’s text.”<sup>21</sup>

Finally, the Supreme Court considered the views of the executive branch but declined to decide whether to give deference to these views. In an amicus brief, the executive branch had supported GE Energy’s position and claimed that, as “the Branch constitutionally responsible for negotiating and enforcing treaties,” the executive’s interpretation was “entitled to great weight.”<sup>22</sup> The Court stated:

<sup>15</sup> *Id.* (quoting ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 93 (2012)).

<sup>16</sup> *Id.* (citation omitted).

<sup>17</sup> *Id.* at 1646 (quoting *Medellín v. Texas*, 552 U.S. 491, 507 (2008)).

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 1647.

<sup>21</sup> *Id.* (citation omitted).

<sup>22</sup> Brief for the United States as Amicus Curiae Supporting Petitioner at 30, *GE Energy Power*, 140 S. Ct. 1637 (No. 18-1048) (citation omitted). *Cf.* RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 306(6) (2018) (“Courts in the United States have final authority to interpret a treaty for purposes of

We have never provided a full explanation of the basis for our practice of giving weight to the Executive's interpretation of a treaty. Nor have we delineated the limitations of this practice, if any. But we need not resolve these issues today. Our textual analysis aligns with the Executive's interpretation so there is no need to determine whether the Executive's understanding is entitled to "weight" or "deference."<sup>23</sup>

After concluding that the New York Convention did not prohibit GE Energy from enforcing the arbitration clauses, the Supreme Court remanded the case for the lower court to address whether "GE Energy could enforce the arbitration clauses under principles of equitable estoppel or which body of law governs that determination."<sup>24</sup>

#### STATE JURISDICTION AND IMMUNITY

*U.S. Supreme Court Rules that Victims of State-Sponsored Terrorism Can Sue Foreign States for Retroactive Punitive Damages Under the Foreign Sovereign Immunities Act*

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In *Opati v. Republic of Sudan*, the Supreme Court upheld a \$4.3 billion award of punitive damages against Sudan for its support of the 1998 bombings of U.S. embassies in Kenya and Tanzania. The Supreme Court held that Congress's 2008 amendments to the Foreign Sovereign Immunities Act (FSIA) authorized the plaintiffs to recover punitive damages from state sponsors of terrorism for acts committed prior to the enactment of these amendments. This case is part of a broader trend of U.S. litigation brought against states who are designated sponsors of terrorism or alternatively are deemed responsible for acts of terrorism within the United States.

Following the 1998 bombings of U.S. embassies in Kenya and Tanzania, victims and family members sued Sudan for its alleged facilitation of these attacks.<sup>1</sup> At the time, Sudan had already been designated by the U.S. State Department as a state sponsor of terrorism.<sup>2</sup> Plaintiffs were therefore able to sue Sudan for money damages, as an exception added in 1996 to the FSIA withheld immunity from state sponsors of terrorism in cases alleging their responsibility for the death or personal injury of U.S. citizens through acts like

applying it as law in the United States. In doing so, they ordinarily give great weight to an interpretation by the executive branch.").

<sup>23</sup> *GE Energy Power*, *supra* note 1, at 1647 (citation omitted).

<sup>24</sup> *Id.* at 1648. Justice Sotomayor wrote a concurring opinion, noting: "I agree with the Court that the [New York Convention] does not categorically prohibit the application of domestic doctrines, such as equitable estoppel, that may permit nonsignatories to enforce arbitration agreements. I note, however, that the application of such domestic doctrines is subject to an important limitation: Any applicable domestic doctrines must be rooted in the principle of consent to arbitrate." *Id.* (Sotomayor, J., concurring).

<sup>1</sup> *Opati v. Republic of Sudan*, 140 S. Ct. 1601, 1604 (2020).

<sup>2</sup> The U.S. State Department designated Sudan as a state sponsor of terrorism on August 12, 1993. 58 Fed. Reg. 52,397, 52,523 (1993). The State Department still maintains this designation. U.S. Dep't of State Press Release, State Sponsors of Terrorism, at <https://www.state.gov/state-sponsors-of-terrorism> [<https://perma.cc/3AMY-BB7V>]. Recently, Sudan has sought to have this designation removed. Hilary Mossberg & John Prendergast, *Sudan's Push for Removal from U.S. Terror List: Not a Panacea*, JUST SECURITY (Jan. 29, 2020), at <https://www.justsecurity.org/68275/sudans-push-for-removal-from-u-s-terror-list-not-a-panacea>.

extrajudicial killings.<sup>3</sup> This exception to immunity came with the limitation that punitive damages could not be awarded against the state sponsor of terrorism.<sup>4</sup>

In 2008, Congress again amended the FSIA to, among other things, allow plaintiffs suing under the state sponsor of terrorism exception to recover punitive damages. The amendments also created a new federal cause of action for such cases; mandated that existing lawsuits filed under this exception be treated “as if” they had been filed under the 2008 amended FSIA; and enabled “plaintiffs to file *new* actions ‘arising out of the same act or incident’ as an earlier action and claim the benefits of [the amended terrorism exception].”<sup>5</sup> Congress placed many of these changes in a new statutory provision—28 U.S.C. § 1605A.<sup>6</sup>

As a result of these changes, the plaintiffs in the suit against Sudan “amended their complaint to include the new federal cause of action, and hundreds of additional victims and family members filed new claims.”<sup>7</sup> Sudan declined to participate in the consolidated bench trial, and the district court entered a default judgment for the plaintiffs.<sup>8</sup> With the help of seven special masters in the determination of damages, the court awarded the plaintiffs around \$10.2 billion in damages, of which around \$4.3 billion were punitive damages.<sup>9</sup> Sudan later made an appearance and appealed the decision to the D.C. Circuit.<sup>10</sup> Although the D.C. Circuit upheld the district court’s determination of Sudan’s liability, it vacated the award of punitive damages on the ground that Congress had not been sufficiently clear in providing that punitive damages would be retroactively available for cases grounded in pre-2008 conduct.<sup>11</sup> The plaintiffs subsequently filed a petition for writ of certiorari, which the Supreme Court granted to address whether punitive damages were available retroactively in light of the 2008 amendments to the FSIA.<sup>12</sup>

The Supreme Court unanimously held that the 2008 amendments to the FSIA provided for the retroactive award of punitive damages.<sup>13</sup> In an opinion by Justice Gorsuch, the Court

<sup>3</sup> Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104–132, § 221, 110 Stat. 1214, 1241 (amending 28 U.S.C. § 1605 to withhold immunity from designated state sponsors of terrorism in cases brought for money damages by U.S. citizen plaintiffs or regarding U.S. citizen victims alleging personal injury or death that the state caused “by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources . . . for such an act”). Unless the FSIA sets forth an exception to immunity, foreign states are “immune from the jurisdiction” of U.S. courts. 28 U.S.C. § 1604.

<sup>4</sup> 28 U.S.C. § 1606 (providing that foreign states denied immunity under § 1605 or § 1607 are not liable for punitive damages).

<sup>5</sup> *Opati*, *supra* note 1, at 1606; *see generally* National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110–181, § 1083, 122 Stat. 3, 338 (2008) (containing these changes, as well as specifying that such suits could be brought not only with respect to U.S. citizen plaintiffs, but also with respect to plaintiffs who, regardless of citizenship, were affected while working as U.S. governmental employees or contractors).

<sup>6</sup> 28 U.S.C. § 1605A.

<sup>7</sup> *Opati*, *supra* note 1, at 1606.

<sup>8</sup> *See id.*

<sup>9</sup> *See id.* at 1607.

<sup>10</sup> *Id.*

<sup>11</sup> *Owens v. Republic of Sudan*, 864 F.3d 751, 816–18, 825 (D.C. Cir. 2017), *vacated sub nom.* *Opati v. Republic of Sudan*, 140 S. Ct. 1601 (2020).

<sup>12</sup> *Opati*, *supra* note 1, at 1606; Petition for Writ of Certiorari in *i*, *Opati*, 140 S. Ct. 1601 (2020) (No. 17–1268). The Department of Justice submitted an amicus brief in support of the petition for certiorari in which it asserted that the D.C. Circuit erred in vacating the award of punitive damages. Brief for the United States as Amicus Curiae at 10, *Opati*, 140 S. Ct. 1601 (2020) (No. 17–1268). The DOJ contended that the 2008 amended FSIA does hold foreign states liable for punitive damages for actions committed prior to the 2008 amendments. *Id.* at 16.

<sup>13</sup> *Opati*, *supra* note 1, at 1608–09.

concluded that Congress made this clear because it both “(1) . . . authorized punitive damages under a new cause of action; and (2) . . . explicitly made that new cause of action available to remedy certain past acts of terrorism.”<sup>14</sup> The Court rejected Sudan’s argument that Congress should be required to provide a “super-clear statement” for the authorization of retroactive punitive damages.<sup>15</sup> While the Court stated that it did not “doubt that applying new punishments to completed conduct can raise serious constitutional questions,” it advised litigants to “challenge the law’s constitutionality, not ask a court to ignore the law’s manifest direction.”<sup>16</sup> The Supreme Court therefore vacated the D.C. Circuit’s decision to the extent that it had stricken the award for punitive damages.<sup>17</sup> Despite this favorable ruling, the plaintiffs could still face obstacles in enforcing the judgment against Sudan—a pervasive problem in such cases.<sup>18</sup>

In its opinion, the Supreme Court grounded the U.S. law of sovereign immunity in considerations of international comity:

The starting point for nearly any dispute touching on foreign sovereign immunity lies in *Schooner Exchange v. MacFaddon*, 7 Cranch 116, 3 S.Ct. 287 (1812). There, Chief Justice Marshall explained that foreign sovereigns do not enjoy an inherent right to be held immune from suit in American courts: “The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself.”<sup>19</sup>

The Court also cited a more recent decision from 2004 for the proposition that “foreign sovereign immunity is a matter of ‘grace and comity.’”<sup>20</sup> This understanding of sovereign immunity is potentially at odds with the view that foreign sovereign immunity is, at least under certain conditions, required as a matter of customary international law.<sup>21</sup>

The *Opati* decision is one of many recent cases in the United States in which plaintiffs have been awarded punitive damages against state sponsors of terrorism.<sup>22</sup> As in *Opati*, these decisions have often been rendered in the district courts as default judgments, owing to the failure of foreign state defendants to appear in court.<sup>23</sup> Overall, courts have awarded plaintiffs

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 1609.

<sup>16</sup> *Id.* at 1609–10.

<sup>17</sup> *Id.* at 1610.

<sup>18</sup> E. Perot V. Bissell & Joseph R. Schottenfeld, *Exceptional Judgments: Revising the Terrorism Exception to the Foreign Sovereign Immunities Act*, 127 YALE L.J. 1890, 1899 (2018) (noting that punitive damages “regularly go unrecovered” in FSIA suits).

<sup>19</sup> *Opati*, *supra* note 1, at 1605 (quoting *The Schooner Exch. v. McFaddon*, 11 U.S. (7 Cranch) 116, 136 (1812)).

<sup>20</sup> *Id.* (citing *Republic of Austria v. Altmann*, 514 U.S. 677, 689 (2004)).

<sup>21</sup> See Jasper Finke, *Sovereign Immunity: Rule, Comity, or Something Else?*, 21 EUR. J. INT’L L. 853, 854–56, 870–71 (2011) (discussing various courts’ understanding of sovereign immunity); see also *Jurisdictional Immunities of the State* (Ger. v. It.: Greece intervening), Judgment, 2012 ICJ Rep. 99, para. 78 (Feb. 3) (“[T]he Court considers that customary international law continues to require that a State be accorded immunity in proceedings for torts allegedly committed on the territory of another State by its armed forces and other organs of State in the course of conducting an armed conflict.”).

<sup>22</sup> Bissell & Schottenfeld, *supra* note 18, at 1890–92 (discussing suits brought against Cuba and Iran under the terrorism exception of the FSIA).

<sup>23</sup> *Id.*



substantial punitive damages against foreign states, with the awards collectively reaching many billions of dollars.<sup>24</sup>

Litigation in the United States against foreign states for their alleged involvement in acts that harm Americans is likely to continue increasing. In 2016, Congress overrode President Obama's veto to enact the Justice Against Sponsors of Terrorism Act (JASTA). Codified largely in 28 U.S.C. § 1605B, the JASTA creates a new statutory exception to state immunity related to terrorism.<sup>25</sup> Section 1605B removes immunity from states, including ones that have *not* been designated by the State Department as sponsors of terrorism, with respect to suits alleging:

[p]hysical injury to person or property or death occurring in the United States and caused by—(1) an act of international terrorism in the United States; and (2) a tortious act or acts of the foreign state [or its officials] . . . regardless where the tortious act or acts of the foreign state occurred.<sup>26</sup>

Congress provided that the JASTA applies to “any civil action—(1) pending on, or commenced on or after, the date of [its] enactment . . . ; and (2) arising out of an injury to a person, property, or business on or after September 11, 2001.”<sup>27</sup> While the JASTA does not itself provide a cause of action or specify the availability of punitive damages, it opens the door to lawsuits grounded in other federal or state laws, including ones that allow for punitive or treble damages. It might prove difficult in light of *Opati* for foreign states to raise retroactivity challenges in such cases with respect to the award of such damages.<sup>28</sup>

The string of litigation against foreign states has continued even amid the coronavirus pandemic. Contending that China was responsible for the spread of the coronavirus, numerous actors have brought lawsuits against China for its alleged “malfeasance, misfeasance, and/or nonfeasance,” which, the plaintiffs contend, “caused the pandemic.”<sup>29</sup> The plaintiffs invoke

<sup>24</sup> *Id.* For critiques of these awards, see *id.* at 1899–909 (arguing that large punitive damages run counter to U.S. policy interests); Haim Abraham, *Awarding Punitive Damages Against Foreign States Is Dangerous and Counterproductive*, LAWFARE (Mar. 1, 2019), at <https://www.lawfareblog.com/awarding-punitive-damages-against-foreign-states-dangerous-and-counterproductive> (arguing that large punitive damages imposed against foreign states make it difficult for plaintiffs to enforce compensatory awards and threaten “the peaceful international order”).

<sup>25</sup> Justice Against Sponsors of Terrorism Act, Pub. L. No. 114–222, 130 Stat. 852 (2016) [hereinafter JASTA]; Jennifer Steinhauer, Mark Mazzetti & Julie Hirschfeld Davis, *Congress Votes to Override Obama Veto on 9/11 Victims Bill*, N.Y. Times (Sept. 28, 2016), at <https://www.nytimes.com/2016/09/29/us/politics/senate-votes-to-override-obama-veto-on-9-11-victims-bill.html>.

<sup>26</sup> 28 U.S.C. § 1605B(b).

<sup>27</sup> JASTA, *supra* note 25, § 7, 130 Stat. at 855. In a case involving Saudi Arabia, plaintiffs sued the country for its involvement in the terrorist attacks on September 11, 2001 under the JASTA. *Ashton v. Al Qaeda Islamic Army* (In re Terrorist Attacks on September 11, 2001), 298 F. Supp. 3d 631 (S.D.N.Y. 2018). The federal district court held that the JASTA “provides courts with new legal principles to apply, retroactively and prospectively, in determining claims for sovereign immunity.” *Id.* at 661 (emphasis added).

<sup>28</sup> See *Opati*, *supra* note 1, at 1610 (advising the D.C. Circuit to reconsider its holding that punitive damages were not retroactively available following the 2008 FSIA amendments with respect to the plaintiffs’ separate state law claims); Haley S. Anderson, *The Significance of the Supreme Court’s Opati Decision for States and Companies Sued for Terrorism in U.S. Courts*, JUST SECURITY (May 19, 2020), at <https://www.justsecurity.org/70260/the-significance-of-the-supreme-courts-opati-decision-for-states-and-companies-sued-for-terrorism-in-u-s-courts>.

<sup>29</sup> *E.g.*, First Amended Class Action Complaint at 3, *Alters v. People’s Republic of China*, No. 120–2110 (S.D. Fla. May 4, 2020).

various exceptions to immunity set forth in the FSIA, including Section 1605B.<sup>30</sup> Aside from these efforts to hold China accountable under existing exceptions in the FSIA, some legislators have signaled their interest in amending the FSIA to strip China of sovereign immunity relating to its handling of the coronavirus pandemic.<sup>31</sup> In fact, two legislators, Representative Dan Crenshaw and Senator Tom Cotton, have already introduced bills that would amend the FSIA to include a proposed Section 1605C, allowing foreign states to be sued for spreading COVID-19 and tortious acts relating to the concealment of the existence of COVID-19.<sup>32</sup>

#### INTERNATIONAL ORGANIZATIONS

##### *Trump Administration Submits Notice of U.S. Withdrawal from the World Health Organization Amid COVID-19 Pandemic*

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President Trump decided in mid-April of 2020 to suspend U.S. funding for the World Health Organization (WHO) and to have his administration review its performance, contending that it was biased in favor of China and inept in its handling of the COVID-19 pandemic. In a letter to the WHO director-general a month later, Trump informed the director-general that his administration's review confirmed his accusations. He threatened that, unless the WHO implemented significant reforms, the United States would reconsider its membership in the organization. Less than two weeks later, on May 29, 2020, Trump announced his decision to terminate the U.S. relationship with the WHO. On July 6, the administration gave formal notice of U.S. withdrawal to the UN secretary-general, the depositary for the WHO Constitution. Assuming certain legal preconditions are satisfied and the notice of withdrawal is not revoked, the withdrawal will take effect on July 6, 2021.

<sup>30</sup> *Id.* at 11–14 (invoking 28 U.S.C. § 1605(a)(2) (commercial activity exception); § 1605(a)(5) (exception for personal injury or death or property damage occurring within the United States caused by certain tortious activity of the foreign state or its officials); § 1605B (the JASTA's exception)); *see also* First Amended Class Action Complaint at 22, *Bella Vista LLC v. People's Republic of China*, No. 220–0574 (D. Nev. Mar. 23, 2020) (invoking these same provisions); Class Action Complaint at 3, *Buzz Photos v. People's Republic of China*, No. 320–0656 (N.D. Tex. Mar. 17, 2020) (asserting the Court has subject matter jurisdiction under “the Justice Against Sponsors of Terrorism Act (“JASTA”) exception” and separately invoking 28 U.S.C. § 1605); Class Action Complaint at 10, *Benitez-White v. People's Republic of China*, No. 420–1562 (S.D. Tex. May 3, 2020) (maintaining that China is not entitled to sovereign immunity under the JASTA).

<sup>31</sup> Sean Mirski, *Senate Judiciary Committee Examines the Foreign Sovereign Immunities Act and Coronavirus-Related Suits Against China*, *LAWFARE* (June 30, 2020), at <https://www.lawfareblog.com/senate-judiciary-committee-examines-foreign-sovereign-immunities-act-and-coronavirus-related-suits>; Comm. on the Judiciary, *The Foreign Sovereign Immunities Act, Coronavirus, and Addressing China's Culpability* (June 23, 2020), at <https://www.judiciary.senate.gov/meetings/the-foreign-sovereign-immunities-act-coronavirus-and-addressing-chinas-culpability>.

<sup>32</sup> *Holding the Chinese Communist Party Accountable for Infecting Americans Act of 2020*, S. 3662, 116th Cong. § 4 (2020); *Holding the Chinese Community Party Accountable for Infecting Americans Act of 2020*, H.R. 6519, 116th Cong. § 4 (2020).

The WHO was established on April 7, 1948, when the WHO Constitution entered into force.<sup>1</sup> Because the WHO Constitution does not provide for withdrawal,<sup>2</sup> when the United States sought membership in the WHO, the House and the Senate stipulated in a joint resolution authorizing U.S. membership that:

In adopting this joint resolution the Congress does so with the understanding that, in the absence of any provision in the World Health Organization Constitution for withdrawal from the Organization, the United States reserves its right to withdraw from the Organization on a one-year notice: *Provided, however*, That the financial obligations of the United States to the Organization shall be met in full for the Organization's current fiscal year.<sup>3</sup>

President Truman made explicit that he was “acting pursuant to the authority granted by the joint resolution of the Congress . . . and subject to the provisions of that joint resolution” when he submitted the instrument of U.S. acceptance to the WHO Constitution.<sup>4</sup> A copy of the joint resolution was enclosed with this instrument of acceptance.<sup>5</sup> At the First World Health Assembly on July 2, 1948, the Assembly unanimously adopted a resolution that “[r]ecognized the validity of the ratification of the Constitution by the United States of America.”<sup>6</sup> This resolution passed after a short discussion in which the desirability of U.S. admission to the WHO was emphasized even though, as the UK representative put it, “[t]here [was] nothing to be gained by attempting to deny that certain conditions are attached to the ratification.”<sup>7</sup>

In confronting the novel coronavirus, the WHO has faced a pandemic unparalleled in the modern era.<sup>8</sup> Trump began criticizing the WHO's response to the outbreak beginning in late March of 2020, voicing concerns that the Organization had “very—very much sided with China.”<sup>9</sup> Trump's criticisms of the WHO escalated in early April when he warned that he would be “put[ting] a hold on” funding to the Organization because it had purportedly

<sup>1</sup> United Nations Depository Status for the Constitution of the World Health Organization, at [https://treaties.un.org/Pages/ShowMTDSGDetails.aspx?src=UNTSOnline&tabid=2&mtdsg\\_no=IX-1&chapter=9&lang=en](https://treaties.un.org/Pages/ShowMTDSGDetails.aspx?src=UNTSOnline&tabid=2&mtdsg_no=IX-1&chapter=9&lang=en) [hereinafter Depository Status for the WHO Constitution].

<sup>2</sup> See generally Constitution of the World Health Organization, *opened for signature* July 22, 1946, 62 Stat. 2679, 14 UNTS 185.

<sup>3</sup> Act of June 14, 1948, Pub. L. No. 80–643, § 4, 62 Stat. 441 [hereinafter Joint Resolution Authorizing WHO Membership]. For more on how this provision came to be included in the joint resolution, see Jean Galbraith, *The US Cannot Withdraw from the WHO Without First Paying Its Dues*, JUST SECURITY (May 26, 2020), at <https://www.justsecurity.org/70384/the-us-cannot-withdraw-from-the-who-without-first-paying-its-dues>.

<sup>4</sup> 62 Stat. 2792 (1948) (reproducing Truman's acceptance of the WHO Constitution on behalf of the United States) [hereinafter U.S. Acceptance of the WHO Constitution].

<sup>5</sup> 62 Stat. 2792–93 (1948).

<sup>6</sup> *Id.* (reproducing a communication made by the UN secretary-general to the U.S. secretary of state); see also World Health Assembly Res. WHA1.76, para. 1 (July 2, 1948).

<sup>7</sup> World Health Assembly, 1st Sess., 10th plen. mtg. at 77–80 (1948), available at [https://apps.who.int/iris/bitstream/handle/10665/85592/Official\\_record13\\_eng.pdf?sequence=1&isAllowed=y](https://apps.who.int/iris/bitstream/handle/10665/85592/Official_record13_eng.pdf?sequence=1&isAllowed=y) [<https://perma.cc/LXL9-Y83J>].

<sup>8</sup> Tedros Adhanom Ghebreyesus, Dir.-Gen., World Health Org., Opening Remarks at the Member State Briefing on the COVID-19 Pandemic Evaluation (July 9, 2020), at <https://www.who.int/dg/speeches/detail/who-director-general-opening-remarks-at-the-member-state-briefing-on-the-covid-19-pandemic-evaluation-9-july-2020> (calling the coronavirus pandemic an “unprecedented threat”).

<sup>9</sup> Remarks at a White House Coronavirus Task Force Press Briefing, 2020 DAILY COMP. PRES. DOC. 190, at 11 (Mar. 25).

mishandled the coronavirus outbreak.<sup>10</sup> He criticized the WHO for not declaring the coronavirus outbreak a pandemic sooner,<sup>11</sup> “minimiz[ing] the threat very strongly,”<sup>12</sup> announcing in January that the virus could not be transmitted between humans,<sup>13</sup> and criticizing his decision to restrict travel from China.<sup>14</sup> On April 14, Trump announced that he was “instructing my administration to halt funding of the World Health Organization while a review is conducted to assess [its] role in severely mismanaging and covering up the spread of the coronavirus.”<sup>15</sup> His response immediately drew criticism from foreign leaders.<sup>16</sup> Closer to home, leading congressional Democrats described Trump’s decision as an “abdication of international responsibility and leadership” and an attempt to deflect attention from how the “White House . . . grossly mishandled this crisis from the beginning, ignoring multiple warnings and squandering valuable time, dismissing medical science, [and] comparing COVID-19 to the common cold.”<sup>17</sup>

On the first day of the Seventy-third World Health Assembly held virtually on May 18, Trump sent a four-page letter to the WHO director-general.<sup>18</sup> In the letter, Trump

<sup>10</sup> Remarks at a White House Coronavirus Task Force Press Briefing, 2020 DAILY COMP. PRES. DOC. 247, at 4 (Apr. 7).

<sup>11</sup> *Id.* (“[The WHO] really—they missed the call. They could have called it months earlier. They would have known, and they should have known.”).

<sup>12</sup> Remarks at a White House Coronavirus Task Force Press Briefing, 2020 DAILY COMP. PRES. DOC. 250, at 5 (Apr. 8).

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* For an analysis of the validity of Trump’s criticisms at the April 8 briefing, see Aaron Blake, *Trump vs. the WHO: Breaking Down the President’s Claims and the WHO’s Actions*, WASH. POST (Apr. 9, 2020), at <https://www.washingtonpost.com/politics/2020/04/09/trump-vs-who> (noting, for example, that the WHO had not announced in January that the virus could not be transmitted between humans, but rather stated only that Chinese investigations had “found no clear evidence of human-to-human transmission”).

<sup>15</sup> The President’s New Conference, 2020 DAILY COMP. PRES. DOC. 266, at 1 (Apr. 14); see also White House Press Release, President Donald J. Trump Is Demanding Accountability from the World Health Organization (Apr. 15, 2020), at <https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-demanding-accountability-world-health-organization> [<https://perma.cc/G2E9-FSWL>] (listing the Trump administration’s criticisms of the WHO’s handling of the coronavirus pandemic and “structural issues and necessary reforms”). As of July 2020, the United States has an outstanding balance of almost \$58 million with the WHO for the current year. World Health Org., Assessed Contributions Overview for All Member States (July 31, 2020), at [https://www.who.int/about/finances-accountability/funding/AC\\_Status\\_Report\\_2020.pdf?ua=1](https://www.who.int/about/finances-accountability/funding/AC_Status_Report_2020.pdf?ua=1) [<https://perma.cc/3RTD-TCGJ>]. Taking into account its outstanding balance from years prior, the United States has a total outstanding balance of \$99 million. *Id.* In addition, the United States has historically made even larger voluntary contributions to the WHO—contributions which from fiscal years 2012 to 2018 averaged around \$254 million per year. LUISA BLACHFIELD & TIJAJI SALAAM-BLYTHER, CONG. RESEARCH SERV., IN11369, U.S. FUNDING TO THE WORLD HEALTH ORGANIZATION 1 (2020), at <https://crsreports.congress.gov/product/pdf/IN/IN11369> [<https://perma.cc/5PR2-4TSV>].

<sup>16</sup> Rick Noack, *After Trump Suspends Payments to WHO, Other Countries Rally Behind the Agency*, WASH. POST (Apr. 15, 2020), at [https://www.washingtonpost.com/world/after-trump-suspends-payments-to-who-other-countries-rally-behind-the-agency/2020/04/15/1a2ec7c6-7f0e-11ea-84c2-0792d8591911\\_story.html](https://www.washingtonpost.com/world/after-trump-suspends-payments-to-who-other-countries-rally-behind-the-agency/2020/04/15/1a2ec7c6-7f0e-11ea-84c2-0792d8591911_story.html) (reporting that officials from the EU, Iran, New Zealand, and Russia criticized the decision, while other officials reaffirmed their support for the WHO).

<sup>17</sup> Justin Wise, *Democrats Blast Trump’s Move to Suspend WHO Funding*, THE HILL (Apr. 14, 2020), at <https://thehill.com/homenews/House/492839-democrats-blast-trump-move-to-suspend-who-funding> (quoting Representative Karen Bass and Senator Patrick Leahy).

<sup>18</sup> Letter from Donald J. Trump, President of the United States, to Tedros Adhanom Ghebreyesus, Dir.-Gen., World Health Org. (May 18, 2020), available at <https://www.whitehouse.gov/wp-content/uploads/2020/05/Tedros-Letter.pdf> [<https://perma.cc/2YXG-8GDT>] [hereinafter U.S. Letter to the WHO]. Although Trump was invited to speak at the Seventy-third World Health Assembly, he declined the request. Gerry Shih, Emily Rauhala & Josh Dawsey, *China’s Xi Backs WHO-Led Review of COVID-19 Outbreak*, WASH. POST (May 18,

asserted that his administration's review of the Organization's handling of the pandemic "confirmed many of the serious concerns I raised last month . . . especially the World Health Organization's alarming lack of independence from the People's Republic of China."<sup>19</sup> The letter largely reiterated Trump's previous criticisms of the WHO, but in more detail.<sup>20</sup> He also accused the WHO of ignoring early reports of the virus's spread in Wuhan and not investigating the situation, improperly praising China for its transparency despite irregularities in China's reporting of information to the WHO, and issuing "grossly inaccurate or misleading" information of the coronavirus.<sup>21</sup> Trump concluded the letter with an ultimatum that "if the World Health Organization does not commit to major substantive improvements within the next 30 days, I will make my temporary freeze of United States funding to the World Health Organization permanent and reconsider our membership in the organization."<sup>22</sup>

On May 29, just eleven days after sending the letter to the WHO, Trump announced that he would be "terminating" U.S. engagement with the WHO.<sup>23</sup> Trump stated:

We have detailed the reforms that it must make and engage with them directly, but they have refused to act. Because they have failed to make the requested and greatly needed reforms, we will be today terminating our relationship with the World Health Organization and redirecting those funds to other worldwide and deserving, urgent, global public health needs.<sup>24</sup>

Then, on July 6, the Trump administration formally submitted the U.S. notice of withdrawal from the WHO Constitution to the UN secretary-general, the depositary for the WHO Constitution.<sup>25</sup> The following day, the spokesperson for the secretary-general stated:

2020), at [https://www.washingtonpost.com/world/asia\\_pacific/chinas-xi-backs-who-led-review-of-covid-19-outbreak-proposes-aid-for-developing-world/2020/05/18/911a1544-98df-11ea-ad79-eef7cd734641\\_story.html](https://www.washingtonpost.com/world/asia_pacific/chinas-xi-backs-who-led-review-of-covid-19-outbreak-proposes-aid-for-developing-world/2020/05/18/911a1544-98df-11ea-ad79-eef7cd734641_story.html).

<sup>19</sup> U.S. Letter to the WHO, *supra* note 18, at 1; *but see* Pien Huang, *Fact-Checking and Assessing Trump's Letter of Rebuke to WHO*, NPR (May 20, 2020), at <https://www.npr.org/sections/goatsandsoda/2020/05/20/858911395/fact-checking-and-assessing-trumps-letter-of-rebuke-to-who> (critiquing the accuracy of various claims in the letter).

<sup>20</sup> U.S. Letter to the WHO, *supra* note 18, at 1–4.

<sup>21</sup> *Id.* at 1–3. In addition to these criticisms of the WHO's handling of the pandemic, the Trump administration has also condemned the Organization for excluding Taiwan from the World Health Assembly, accusing the director-general of yielding to pressure from Beijing. Michael R. Pompeo, Sec'y of State Press Release, Taiwan's Exclusion from the World Health Assembly (May 18, 2020), at <https://www.state.gov/taiwans-exclusion-from-the-world-health-assembly> [<https://perma.cc/AQ7X-5QZC>].

<sup>22</sup> U.S. Letter to the WHO, *supra* note 18, at 4. At the World Health Assembly, U.S. Secretary of Health and Human Services Alex Azar leveled further criticisms against the WHO, attributing the scale of the pandemic to the WHO's "failure . . . to obtain the information that the world needed, and that failure cost many lives." Plenary Statement from U.S. Secretary of Health and Human Services Alex M. Azar II to the World Health Assembly, at 1, at [https://apps.who.int/gb/statements/WHA73/PDF/United\\_States\\_of\\_America.pdf](https://apps.who.int/gb/statements/WHA73/PDF/United_States_of_America.pdf) [<https://perma.cc/G26H-S6WP>].

<sup>23</sup> Remarks on United States Actions Against China, 2020 DAILY COMP. PRES. DOC. NO. 405, at 1 (May 29).

<sup>24</sup> *Id.*

<sup>25</sup> Stéphan Dujarric, Spokesman for the Sec'y-Gen. Press Release, Note to Correspondents in Answer to Questions Regarding the World Health Organization (July 7, 2020), at <https://www.un.org/sg/en/content/sg/note-correspondents/2020-07-07/note-correspondents-answer-questions-regarding-the-world-health-organization> [<https://perma.cc/3KVN-SVS3>] [hereinafter UN Acknowledgement of U.S. Notice of Withdrawal].



[O]n 6 July 2020, the United States of America notified the Secretary-General . . . of its withdrawal from the World Health Organization, effective on 6 July 2021.

The United States is a party to the World Health Organization Constitution since 21 June 1948. The United States' participation in the World Health Organization was accepted by the World Health Assembly with certain conditions set out by the US for its eventual withdrawal from the World Health Organization. The said conditions include giving a one-year notice and fully meeting the payment of assessed financial contributions.

The Secretary-General, in his capacity as depository, is in the process of verifying with the World Health Organization whether all the conditions for such withdrawal are met.<sup>26</sup>

In a communication to the other treaty parties on July 14, 2020, the secretary-general stated that the withdrawal “would take effect for the United States of America on 6 July 2021 pursuant to the provisions of the Joint Resolution of the Congress of the United States to which the acceptance of the Constitution of the World Health Organization by the United States is subject.”<sup>27</sup>

After the initial announcement in late May, the director-general of the WHO stated that the Organization “wish[es] for this collaboration to continue” with the United States.<sup>28</sup> Other foreign leaders and health officials criticized the U.S. decision. The president of the European Commission issued a statement urging the United States to reconsider,<sup>29</sup> and the health minister of South Africa labelled the decision “unfortunate.”<sup>30</sup> The notice of withdrawal received strong criticism domestically, with House Speaker Nancy Pelosi calling it “an act of true senselessness” that “is crippling the international effort to defeat the virus.”<sup>31</sup> Others have observed that the U.S. withholding of funds and withdrawal from the WHO would severely undermine not just the Organization's short-term initiatives addressing the COVID-19 pandemic, but also its long-term public health initiatives around the world.<sup>32</sup>

<sup>26</sup> *Id.*

<sup>27</sup> United Nations, Depository Notification C.N.302.2020.TREATIES-IX.1 (July 14, 2020), available at <https://treaties.un.org/doc/Publication/CN/2020/CN.302.2020-Eng.pdf> [hereinafter Depository Notification].

<sup>28</sup> Pien Huang, *WHO's Measured Reaction to Trump's Pledge to Cut U.S. Ties to the Agency*, NPR (June 1, 2020), at <https://www.npr.org/sections/goatsandsoda/2020/05/29/865816855/whos-muted-reaction-to-trumps-pledge-to-withdraw-u-s-from-the-u-n-agency>.

<sup>29</sup> European Commission Press Release, STATEMENT/20/983, US Announcement on Breaking Ties with the World Health Organisation: Statement by the President of the Commission Ursula Von Der Leyen and High Representative/Vice-President Josep Borrell (May 30, 2020), at [https://ec.europa.eu/commission/presscorner/detail/en/STATEMENT\\_20\\_983](https://ec.europa.eu/commission/presscorner/detail/en/STATEMENT_20_983) [<https://perma.cc/5MHX-YJWW>].

<sup>30</sup> Karla Adam, *Trump's Exit from WHO Met with Dismay from Global Health Experts*, WASH. POST (May 30, 2020), at [https://www.washingtonpost.com/world/trump-world-health-organization-criticism/2020/05/30/a9650984-a26b-11ea-be06-af5514ee0385\\_story.html](https://www.washingtonpost.com/world/trump-world-health-organization-criticism/2020/05/30/a9650984-a26b-11ea-be06-af5514ee0385_story.html).

<sup>31</sup> Nancy Pelosi (@SpeakerPelosi), TWITTER (July 7, 2020 5:20 PM), at <https://twitter.com/SpeakerPelosi/status/1280612714570813448>; see also *Coronavirus: Backlash After Trump Signals US Exit from WHO*, BBC (May 30, 2020), at <https://www.bbc.com/news/world-us-canada-52862588> (reporting that Republican Senator Lamar Alexander and Democratic Senator Elizabeth Warren both issued statements criticizing Trump's announcement of the termination of U.S. relations with the WHO).

<sup>32</sup> See, e.g., *Freezing World Health Organization Funding is Dangerous*, 580 NATURE 431, 431 (2020) (arguing that the loss in U.S. funding threatens the WHO's ability to work on its more than thirty-five emergency operations around the world and other ongoing programs targeting infectious diseases); see also Elijah Wolfson, *Trump Said He Would Terminate the U.S. Relationship with the W.H.O. Here's What That Means*, TIME (June 4, 2020), at

As a matter of international law, the United States is in a special posture relative to other WHO member states because of the conditional right of withdrawal that it incorporated into its original instrument of acceptance—and because of the WHO Assembly’s subsequent acceptance of this instrument. When the WHO Constitution entered into force in 1948, international law was unsettled with respect to withdrawal from treaties that did not provide for withdrawal or termination.<sup>33</sup> In 1949, when the WHO received purported withdrawals from the Soviet Union and various of its allies, the WHO director-general responded that “because [the] Constitution of WHO makes no such provision [for withdrawal] I cannot accept your communication as withdrawal from the Organization.”<sup>34</sup> Unlike these countries, however, the United States reserved a right of withdrawal in its original instrument of acceptance.<sup>35</sup> While customary international law regarding the status of reservations and their acceptance was not clearly fixed in 1948,<sup>36</sup> the unanimous acceptance of the U.S. ratification by the WHO Assembly provides strong legal grounds for treating this right of withdrawal as valid.<sup>37</sup>

Although the United States thus appears to have a distinctive right of withdrawal as a matter of international law, this right is bounded by the prerequisites to withdrawal stipulated in

<https://time.com/5847505/trump-withdrawl-who> (noting that withdrawal from the WHO not only undermines WHO programs on “tropical disease research, HIV and hepatitis, and tuberculosis,” but would also hinder U.S. public health researchers’ access to internally shared data among WHO members).

<sup>33</sup> Laurence R. Helfer, *Terminating Treaties*, in *THE OXFORD GUIDE TO TREATIES* 634, 637–40 (Duncan B. Hollis ed., 2012) (noting that even in the late 1950s before the codification of the Vienna Convention on the Law of Treaties, there were various views among international law jurists on whether states could withdraw from treaties without provisions for termination or withdrawal). The Vienna Convention later came to provide that, where a treaty does not include a withdrawal provision, withdrawal is only available in certain contexts, such as if “the parties intended to admit the possibility of denunciation or withdrawal; or a right of denunciation or withdrawal may be implied by the nature of the treaty.” Vienna Convention on the Law of Treaties, Art. 56, *opened for signature* May 23, 1969, 1155 UNTS 331 [hereinafter VCLT].

<sup>34</sup> EDWIN C. HOYT, *THE UNANIMITY RULE IN THE REVISION OF TREATIES: A RE-EXAMINATION* 70–71 (2012) (discussing this incident, including the later return of these countries to active participation in the WHO, and quoting a communication by the director-general); see also Catherine M. Brölmann, Richard Collins & Ramses A. Wessel, *Exiting International Organizations: A Brief Introduction*, 15 INT’L ORGS. L. REV. 243, 249 (2018) (footnote omitted) (“Practice is not entirely conclusive as to the consequences of these notifications, but arguably suggests that such withdrawal is unlawful, or in any case without legal effect”). That the WHO considered these members inactive is reflected in the resolution passed at the Third World Health Assembly. World Health Assembly Res. WHA3.84, para. 3 (May 19, 1950) (emphasis added) (“Resolves that . . . the World Health Organization will always welcome the *resumption* by these Members of full co-operation in the work of the Organization . . .”). The United Nations depository status page for the WHO Constitution indicates that Russia joined the WHO on March 24, 1948, rather than when the Soviet Union announced it was rejoining the Organization in July 1955. Depository Status for the WHO Constitution, *supra* note 1. Similarly, the Republic of China sought withdrawal from the WHO in May 1950, to which the Assembly resolved that “*resumption* by China of full participation in the work of the Organization will be welcomed.” World Health Assembly Res. WHA3.90, paras. 1, 4 (May 25, 1950) (emphasis added). When the Republic of China rejoined the WHO, the Assembly “welcome[d] the return of China to *active* participation.” World Health Assembly Res. WHA6.6, para. 1 (May 15, 1953) (emphasis added).

<sup>35</sup> See U.S. Acceptance of the WHO Constitution, *supra* note 4 (conditioning the U.S. acceptance on the provisions set forth in Congress’s joint resolution).

<sup>36</sup> See Report of the International Law Commission to the General Assembly, 21 UN GAOR Supp. No. 9, at 35, UN Doc. A/6309/Rev.1 (1966), *reprinted in* [1966] 2 Y.B. INT’L L. COMM’N 203, UN Doc. A/CN.4/SER.A/1966/Add.1 (footnotes omitted) (noting that “[t]he subject of reservations to multilateral treaties has been much discussed in recent years and has been considered by the General Assembly itself on more than one occasion, as well as by the International Court of Justice . . .”).

<sup>37</sup> This process conformed with the procedure that would later be set out in the VCLT. See VCLT, *supra* note 33, Art. 20.3 (providing that “[w]hen a treaty is a constituent instrument of an international organization and unless it otherwise provides, a reservation requires the acceptance of the competent organ of that organization”).

the joint resolution.<sup>38</sup> Consistent with one of these prerequisites, the Trump administration has given a year's notice of the U.S. withdrawal.<sup>39</sup> This notice could be revoked before effectuated—including if Trump is not reelected in the U.S. presidential election in November of 2020.<sup>40</sup> As to another specified prerequisite—the provision that U.S. “financial obligations . . . shall be met in full for the Organization’s current fiscal year”<sup>41</sup>—it remains to be seen whether or how this will be satisfied by the United States. The United States carries an outstanding balance with the WHO of almost \$58 million in the current year and more than an additional \$41 million from prior years.<sup>42</sup>

In addition to these international legal limitations, the Trump administration’s decision to withdraw the United States from the WHO raises issues of domestic law. One issue is whether the executive branch can unilaterally withdraw the United States from the WHO Constitution without congressional approval. The United States joined the WHO not through the treaty process specified in Article II of the Constitution, but rather “pursuant to the authority granted” by the joint resolution passed by Congress.<sup>43</sup> On rare occasions in the past, U.S. presidents have unilaterally withdrawn the United States from international organizations that the United States joined through such joint resolutions.<sup>44</sup> The legality of this practice as a matter of domestic law remains untested in the courts.

A second set of domestic legal issues stems from the conditions on withdrawal set forth in the text of the joint resolution.<sup>45</sup> As international legal limits on the president’s withdrawal power, these conditions may similarly serve as domestic legal limits.<sup>46</sup> Moreover, as a general

<sup>38</sup> See Depository Notification, *supra* note 27.

<sup>39</sup> See Joint Resolution Authorizing WHO Membership, *supra* note 3, § 4; UN Acknowledgement of U.S. Notice of Withdrawal, *supra* note 25.

<sup>40</sup> Revoking a notice of withdrawal before it takes legal effect is permissible under international law. See VCLT, *supra* note 33, Art. 68. Joe Biden, the Democratic presidential nominee, has announced that he would return the United States to the WHO on the first day of his presidency. Joe Biden (@JoeBiden), TWITTER (July 7, 2020, 4:44 PM), at <https://twitter.com/JoeBiden/status/1280603719831359489>.

<sup>41</sup> Joint Resolution Authorizing WHO Membership, *supra* note 3, § 4.

<sup>42</sup> Assessed Contributions Overview for All Member States, *supra* note 15; see also BRANDON J. MURRILL & NINA M. HART, CONG. RESEARCH SERV., LSB10489, WITHDRAWAL FROM THE WORLD HEALTH ORGANIZATION: LEGAL BASIS AND IMPLICATIONS 3 (2020), at <https://crsreports.congress.gov/product/pdf/LSB/LSB10489> (observing that “[i]t is unclear whether the ‘current fiscal year’ [language from in the joint resolution] refers to the fiscal year in which the United States submits a twelve-month notice of intent to withdraw or the fiscal year in which the twelve-month notice period expires” but that “[i]n either case . . . it would appear that the notice cannot legally take effect until the United States pays all current obligations”).

<sup>43</sup> U.S. Acceptance of the WHO Constitution, *supra* note 4.

<sup>44</sup> Curtis A. Bradley, *Exiting Congressional-Executive Agreements*, 67 DUKE L.J. 1615, 1639 & nn. 98, 99 (2018) (noting that this occurred with respect to the International Labor Organization (ILO) and twice with respect to the United Nations Educational, Scientific and Cultural Organization (UNESCO)). With respect to both the ILO and the first UNESCO withdrawal, subsequent presidents rejoined the United States to these international organizations without reobtaining congressional approval. See *id.*

<sup>45</sup> Joint Resolution Authorizing WHO Membership, *supra* note 3, § 4. Additionally, Congress could further challenge the withdrawal by legislating to prevent withdrawal. See A Bill to Prohibit the Use of Funds to Withdraw the United States from the World Health Organization, S. 4240, 116th Cong. § 4 (2020) (proposing that Congress prohibit the Trump administration from using congressional appropriated funds to withdraw from the WHO). In the absence of a supermajority of support in both houses of Congress, however, such a bill would be difficult to enact given the president’s veto power.

<sup>46</sup> With respect to treaties entered into pursuant to the process set forth in Article II of the U.S. Constitution, the *Restatement (Fourth) of Foreign Relations Law* indicates that the “established practice” of unilateral presidential treaty withdrawal is limited to situations where this withdrawal is justified under international law. RESTATEMENT (FOURTH) OF FOREIGN RELATIONS LAW § 313 (2018); see also *id.*, § 313 reporters’ note 5 (noting that, in contrast,



principle of U.S. constitutional law, the president’s “power is at its lowest ebb” when “tak[ing] measures incompatible with the . . . will of Congress.”<sup>47</sup> Should Trump seek to effectuate the U.S. withdrawal without fulfilling all the conditions set forth in the joint resolution, he would be acting in violation of a congressional mandate.<sup>48</sup>

#### INTERNATIONAL ECONOMIC LAW

##### *United States-Mexico-Canada Agreement Enters into Force*

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On November 30, 2018, Canada, Mexico, and the United States signed an agreement renegotiating the North American Free Trade Agreement (NAFTA). By the spring of 2020, all three countries had approved this agreement—known in the United States as the United States-Mexico-Canada Agreement (USMCA)<sup>1</sup>—through their respective domestic ratification processes. The USMCA entered into force on July 1, 2020, amid extended U.S.-Mexico and U.S.-Canada border restrictions due to the COVID-19 pandemic. On August 6, 2020, President Trump imposed tariffs on Canadian aluminum—tariffs that his administration had previously put in place in 2018 but had removed in 2019 in order to smooth the USMCA’s path to ratification.

The negotiation of the USMCA took place over the first two years of the Trump administration. The agreement, signed on November 30, 2018, changed some of NAFTA’s key provisions, including eliminating investor-state dispute settlement between the United States and Canada and modifying the rules of origin for automobiles.<sup>2</sup> The USMCA also added new provisions “address[ing] intellectual property rights, rights for indigenous persons, rules for trade negotiations with non-market countries, and the agreement’s termination.”<sup>3</sup>

“withdrawals that fail . . . to identify [a] justification under international law . . . assert an authority that the Senate likely did not contemplate when approving the treaty”).

<sup>47</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

<sup>48</sup> See MURRILL & HART, *supra* note 42, at 3 (observing that “the President arguably may lack the authority to withdraw from the WHO if he does not adhere to these conditions because Congress enacted them using its constitutional Spending Clause power”); cf. RESTATEMENT (FOURTH) OF FOREIGN RELATIONS LAW, *supra* note 46, § 313 reporters’ note 6 (noting that if the power to withdraw from Article II treaties is not exclusive to the president, Congress may have the power to limit withdrawals through statutes).

<sup>1</sup> The agreement is referred to as the United States-Mexico-Canada Agreement (USMCA), the Canada-United States-Mexico Agreement (CUSMA), or Tratado entre México, Estados Unidos y Canadá (T-MEC), depending on the country referring to the agreement. See Office of the U.S. Trade Rep. Press Release, United States–Mexico–Canada Trade Fact Sheet: Modernizing NAFTA into a 21st Century Trade Agreement (Oct. 2018), at <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/fact-sheets/modernizing> [<https://perma.cc/F67G-XN5L>]; Gov’t of Canada Press Release, A New Canada-United States-Mexico Agreement (Aug. 20, 2020), at <https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cusma-aceum/index.aspx?lang=eng> [<https://perma.cc/77Z8-L96P>]; Gov’t of Mexico Press Release, Textos Finales del Tratado Entre México, Estados Unidos y Canadá (T-MEC), at <https://www.gob.mx/t-mec/acciones-y-programas/textos-finales-del-tratado-entre-mexico-estados-unidos-y-canada-t-mec-202730?state=published>.

<sup>2</sup> Jean Galbraith, *Contemporary Practice of the United States*, 113 AJIL 150, 150 (2019).

<sup>3</sup> *Id.* at 155. For further discussion of the USMCA’s content, see *id.* at 150–59.

The USMCA did not resolve the steel and aluminum tariffs that the Trump administration had imposed on Canada and Mexico earlier in 2018 (or the retaliatory tariffs imposed by Canada and Mexico). On May 17, 2019, the United States agreed with these two countries to lift these tariffs, though providing for possible reimposition if steel or aluminum imports “surge meaningfully beyond historic volumes of trade over a period of time.”<sup>4</sup> These developments reportedly removed a significant political obstacle to the ratification of the USMCA.<sup>5</sup>

On June 19, 2019, Mexico became the first country to receive legislative approval for the USMCA.<sup>6</sup> The path in the United States was not as easy, and the U.S. House of Representatives successfully insisted on modifications to certain USMCA provisions, including “strengthen[ing] compliance mechanisms for the labor and environmental provisions [and] reduc[ing] intellectual property protections for certain kinds of pharmaceuticals.”<sup>7</sup> On December 12, Mexico’s Senate once more approved the USMCA, as renegotiated.<sup>8</sup> On December 19, 2019, and January 16, 2020, respectively, the U.S. House of Representatives and Senate approved the revised USMCA through the passage of the United States-Mexico-Canada Agreement Implementation Act, which Trump signed into law on January 29.<sup>9</sup> Canada’s legislature gave its approval on March 13, 2020, just before taking an extended pause in light of the COVID-19 pandemic.<sup>10</sup>

In April of 2020, the three countries formally notified each other that they had “completed the internal procedures required for the entry into force” of the USMCA and its associated

<sup>4</sup> Office of the U.S. Trade Rep. Press Release, United States Announces Deal with Canada and Mexico to Lift Retaliatory Tariffs (May 17, 2019), at <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2019/may/united-states-announces-deal-canada-and> [<https://perma.cc/W9GC-BHS4>]; Office of the U.S. Trade Rep. Press Release, Joint Statement by the United States and Canada on Section 232 Duties on Steel and Aluminum, available at [https://ustr.gov/sites/default/files/Joint\\_Statement\\_by\\_the\\_United\\_States\\_and\\_Canada.pdf](https://ustr.gov/sites/default/files/Joint_Statement_by_the_United_States_and_Canada.pdf) [<https://perma.cc/237R-6HHL>] (further providing that any retaliatory tariffs would occur “only in the affected sector (i.e., aluminum and aluminum-containing products or steel)”); Office of the U.S. Trade Rep. Press Release, Joint Statement by the United States and Mexico on Section 232 Duties on Steel and Aluminum, available at [https://ustr.gov/sites/default/files/Joint\\_Statement\\_by\\_the\\_United\\_States\\_and\\_Mexico.pdf](https://ustr.gov/sites/default/files/Joint_Statement_by_the_United_States_and_Mexico.pdf) [<https://perma.cc/482V-3RY3>] (including the same provision regarding retaliatory tariffs).

<sup>5</sup> David J. Lynch, Emily Rauhala & Damian Paletta, *Trump Did Something Unusual on the Trade Front: He Removed a Tariff*, WASH. POST (May 17, 2019), at [https://www.washingtonpost.com/business/economy/trump-delays-auto-tariff-threat-for-up-to-180-days/2019/05/17/95432e8e-78a7-11e9-b7ae-390de4259661\\_story.html](https://www.washingtonpost.com/business/economy/trump-delays-auto-tariff-threat-for-up-to-180-days/2019/05/17/95432e8e-78a7-11e9-b7ae-390de4259661_story.html).

<sup>6</sup> Mary Beth Sheridan, *Mexico Becomes First Country to Ratify New North American Trade Deal*, WASH. POST (June 19, 2019), at [https://www.washingtonpost.com/world/the\\_americas/mexico-becomes-first-country-to-ratify-usmca-north-american-trade-deal/2019/06/19/500dd8c0-92b3-11e9-956a-88c291ab5c38\\_story.html](https://www.washingtonpost.com/world/the_americas/mexico-becomes-first-country-to-ratify-usmca-north-american-trade-deal/2019/06/19/500dd8c0-92b3-11e9-956a-88c291ab5c38_story.html) (noting the Mexican Senate’s overwhelmingly supportive vote of 114 to 4).

<sup>7</sup> Jean Galbraith, *Contemporary Practice of the United States*, 114 AJIL 137, 141 (2020) (citing Speaker of the House Press Release, Transcript of Speaker Pelosi Press Conference Announcing New USMCA Agreement (Dec. 10, 2019), at <https://www.speaker.gov/newsroom/121019-2>). Canada and Mexico signed a revised version of the USMCA that incorporated these changes. *Id.*

<sup>8</sup> Anthony Esposito & Peter Cooney, *Mexican Senate Approves Changes to USMCA Regional Trade Deal*, REUTERS (Dec. 12, 2019), at <https://www.reuters.com/article/usa-trade-usmca/mexican-senate-approves-changes-to-usmca-regional-trade-deal-idUSL1N28N00V>.

<sup>9</sup> 165 Cong. Rec. H12284-85 (daily ed. Dec. 19, 2019) (recording a vote of 385–41); 166 Cong. Rec. S266 (daily ed. Jan. 16, 2020) (recording a vote of 89–10); Donald J. Trump, Remarks on Signing the United States-Mexico-Canada Agreement Implementation Act, 2020 DAILY COMP. PRES. DOC. NO. 45 (Jan. 29).

<sup>10</sup> David Ljunggren, *Canadian Parliament Rushes Through Ratification of USMCA Trade Pact*, REUTERS (Mar. 13, 2020), at <https://www.reuters.com/article/us-usa-trade-usmca-canada/canadian-parliament-rushes-through-ratification-of-usmca-trade-pact-idUSKBN210215>.

protocol.<sup>11</sup> Pursuant to this protocol, the USMCA entered into force on July 1, 2020, on the “first day of the third month following the last notification.”<sup>12</sup> This entry into force had the effect of “supersede[ing] the NAFTA, without prejudice to those provisions set forth in the USMCA that refer to provisions of the NAFTA,” and of terminating the 1993 North American Agreement on Labor Cooperation.<sup>13</sup>

The USMCA’s entry into force occurred amid the COVID-19 pandemic. Travel across both the U.S.-Mexico and the U.S.-Canada border has been limited since March 21, 2020, although these limits on “non-essential” travel are not aimed at critical goods or supply chains.<sup>14</sup> It remains to be seen whether or how the entry into force of the USMCA will affect the economic situation of the three countries amid the pandemic.<sup>15</sup> On July 8, 2020, Trump and Mexican President Andrés Manuel López Obrador released a joint statement highlighting the USMCA’s role as an “ideal instrument to provide economic certainty and increased confidence to our countries, which will be critical to the recovery that has begun in both of our nations.”<sup>16</sup>

<sup>11</sup> Protocol Replacing the North American Free Trade Agreement with the Agreement Between the United States of America, the United Mexican States, and Canada, available at [https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/Text/USMCA\\_Protocol.pdf](https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/Text/USMCA_Protocol.pdf) [<https://perma.cc/TU6W-PWXM>] [hereinafter Protocol]; Janyce McGregor, *Canada Notifies U.S. and Mexico It Has Ratified Revised NAFTA*, CBC NEWS (Apr. 3, 2020), at <https://www.cbc.ca/news/politics/nafta-cusma-canada-ratified-1.5520337> (reporting Canada to be the first country to give the notification); Office of U.S. Trade Rep. Press Release, USMCA to Enter into Force July 1 After United States Takes Final Procedural Steps for Implementation (Apr. 24, 2020), at <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2020/april/usmca-enter-force-july-1-after-united-states-takes-final-procedural-steps-implementation> (describing the United States as the third country to provide its notification).

<sup>12</sup> Protocol, *supra* note 11.

<sup>13</sup> *Id.*

<sup>14</sup> U.S. Dep’t of Homeland Security Press Release, Fact Sheet: DHS Measures on the Border to Limit the Further Spread of Coronavirus (Aug. 14, 2020), at <https://www.dhs.gov/news/2020/08/14/fact-sheet-dhs-measures-border-limit-further-spread-coronavirus> [<https://perma.cc/8FV4-REA7>] (noting that these restrictions were initially set for thirty days but have since been continuously extended through September 31); U.S. Customs and Border Prot. Press Release, Temporary Restriction of Travelers Crossing US-Canada and Mexico Land Borders for Non-essential Purposes (Aug. 18, 2020), at [https://help.cbp.gov/s/article/Article-1596?language=en\\_US](https://help.cbp.gov/s/article/Article-1596?language=en_US) (noting that “[s]upply chains, including trucking, will not be impacted”). Citing the pandemic, the United States has placed major new restrictions on asylum seekers crossing the border. See Jean Galbraith, *Contemporary Practice of the United States*, 114 AJIL 504, 510–11 (2020).

<sup>15</sup> See David A. Wemer, *Start of USMCA Brings Hope Amid COVID-19 Economic Crisis*, ATLANTIC COUNCIL (July 1, 2020), at <https://www.atlanticcouncil.org/blogs/new-atlanticist/start-of-usmca-brings-hope-amid-covid-19-economic-crisis> (providing commentary on the USMCA’s impact on the American economy during the pandemic); Meena Venkataramanan & Julián Aguilar, *Trump Called the USMCA the Best Trade Deal Ever. Analysts Say It’s Not Likely to Help Texas During The Pandemic*, TEX. TRIB. (Aug. 12, 2020), at <https://www.texastribune.org/2020/08/12/usmca-trade-agreement-coronavirus-texas-mexico> (“But several months into a COVID-19 pandemic that continues to ravage the global economy, analysts say there isn’t anything in the USMCA that’s going to make an immediate difference and help offset the massive economic losses caused by the pandemic.”). In addition to the ongoing pandemic, some issues that remain in the implementation of the USMCA include “hundreds of legal challenges to Mexico’s new labor law championed by President Andrés Manuel López Obrador to ensure that workers can freely organize and unions are granted full collective bargaining rights.” David Lawder, Dave Graham & David Ljunggren, *New North American Trade Deal Launches Under Cloud of Disputes, Coronavirus*, REUTERS (June 30, 2020), at <https://www.reuters.com/article/us-usa-trade-usmca/new-north-american-trade-deal-launches-under-cloud-of-disputes-coronavirus-idUSKBN2424E2>. If the new labor laws are struck down, Mexico might not be able to implement labor-related provisions in the USMCA, prompting U.S. Representative Richard Neal, chairman of the House Ways and Means Committee, to accuse Mexico of “falling short of its commitments.” *Id.*

<sup>16</sup> Joint Declaration by President Trump and President Andrés Manuel López Obrador of Mexico, 2020 DAILY COMP. PRES. DOC. NO. 502 (July 8).

On August 6, Trump reimposed a 10 percent tariff on certain aluminum products imported from Canada.<sup>17</sup> Trump stated that the 2019 understanding reached with Canada lifting the prior tariffs had sought to “avoid import surges” but that, in the year immediately following this agreement, imports on these aluminum products “increased 87 percent compared to the prior twelve-month period and exceeded the volume of any full calendar year in the previous decade.”<sup>18</sup> Canada’s Deputy Prime Minister Chrystia Freeland responded by describing these tariffs as “unwarranted and unacceptable,” noting that “[i]n the time of a global pandemic and an economic crisis, the last thing Canadian and American workers need is new tariffs.”<sup>19</sup> She stated that “with the new NAFTA having come into force on July 1st, now is the time to advance North American economic competitiveness—not hinder it,” and promised that Canada would “swiftly impose dollar-for-dollar countermeasures.”<sup>20</sup>

#### INTERNATIONAL CRIMINAL LAW

##### *President Trump Authorizes Economic Sanctions and Visa Restrictions Aimed at International Criminal Court*

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In the spring of 2020, the Appeals Chamber of the International Criminal Court (ICC) authorized the ICC’s prosecutor to investigate alleged international crimes committed in Afghanistan. The Trump administration strongly condemned this decision. In an escalation of retaliatory measures against the ICC, President Trump signed an executive order authorizing economic sanctions against foreign persons involved in the investigation and visa restrictions against those persons and their immediate family members. The ICC described these actions as a threat to the rule of law.

On April 12, 2019, a Pre-Trial Chamber of the ICC declined to authorize the prosecutor to conduct an investigation into alleged international crimes committed in Afghanistan, reasoning that such an investigation would not advance the interests of justice.<sup>1</sup> On March 5,

<sup>17</sup> Donald J. Trump, Proclamation 10060—Adjusting Imports of Aluminum into the United States, 2020 DAILY COMP. PRES. DOC. NO. 578 (Aug. 6) [hereinafter Proclamation on Aluminum Tariffs] (providing for this tariff, effective August 16, on non-alloyed unwrought aluminum articles, which “accounted for 59 percent of total aluminum imports from Canada during June 2019 through May 2020”).

<sup>18</sup> *Id.*, paras. 3, 6; but see Amanda Coletta & Jeanne Whalen, *Canada Condemns “Entirely Unacceptable” U.S. Tariffs, Pledges to Retaliate with Levies on \$2.7 Billion of Goods*, WASH. POST (Aug. 7, 2020), at [https://www.washingtonpost.com/world/the\\_americas/canada-us-trade-trump-aluminum-tariffs/2020/08/07/793f30ba-d8b0-11ea-a788-2ce86ce81129\\_story.html](https://www.washingtonpost.com/world/the_americas/canada-us-trade-trump-aluminum-tariffs/2020/08/07/793f30ba-d8b0-11ea-a788-2ce86ce81129_story.html) (noting that the U.S. Aluminum Association described these numbers as “cherry-picked” as “any increase in imports of non-alloyed aluminum in the first half of 2020 have been offset by a decline in imports of alloyed aluminum, and . . . overall, imports of primary aluminum from Canada are ‘near traditional levels’”).

<sup>19</sup> Office of the Deputy Prime Minister of Canada Press Release, Statement by the Deputy Prime Minister on US Tariffs on Imports of Canadian Aluminum (Aug. 6, 2020), at <https://deputyprime.ca/en/news/statements/2020/08/06/statement-deputy-prime-minister-us-tariffs-imports-canadian-aluminum>.

<sup>20</sup> *Id.*; see also Coletta & Whalen, *supra* note 18 (describing the tariffs that Canada announced it would impose in response).

<sup>1</sup> See Situation in the Islamic Republic of Afghanistan, ICC-02/17-138, Judgment on the Appeal Against the Decision on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan, para. 5

2020, the ICC Appeals Chamber reversed, holding that the Pre-Trial Chamber erred in declining to authorize the investigation.<sup>2</sup> The Appeals Chamber directly authorized the prosecutor to begin investigations into “alleged crimes committed on the territory of Afghanistan . . . since 1 May 2003, [and] other alleged crimes that have a nexus to the armed conflict in Afghanistan and are sufficiently linked to the situation and were committed on the territory of other States Parties . . . since 1 July 2002.”<sup>3</sup> This authorization permits the prosecutor to investigate members of the U.S. armed forces and the U.S. Central Intelligence Agency for alleged crimes committed not only in Afghanistan, but also for alleged related crimes committed in detention centers in Poland, Romania, and Lithuania.<sup>4</sup>

Even before the Appeals Chamber’s decision, the Trump administration had strongly resisted the prospect of an ICC investigation regarding Afghanistan that could encompass alleged crimes committed by U.S. citizens.<sup>5</sup> In April 2019, the United States revoked ICC Prosecutor Fatou Bensouda’s visa because her request for authorization of an investigation into Afghanistan had described members of the U.S. armed forces and the Central Intelligence Agency as potential perpetrators of war crimes.<sup>6</sup> When the Pre-Trial Chamber denied the prosecutor’s request in April of 2019, Trump praised the decision as a “major international victory . . . for the rule of law,” but also warned that “[a]ny attempt to target American, Israeli, or allied personnel for prosecution will be met with a swift and vigorous response.”<sup>7</sup>

In the months following the decision of the Appeals Chamber, Trump administration officials reacted angrily to the prospect of U.S. personnel being investigated by the ICC. Secretary of State Mike Pompeo asserted that “we will not stand by as our people are threatened by a kangaroo court.”<sup>8</sup> He also accused the ICC of being “grossly ineffective and corrupt,” stating that the ICC has operated for eighteen years and secured only four convictions.<sup>9</sup> Secretary of Defense Mark Esper praised U.S. military personnel and asserted that the United States

(Mar. 5, 2020), available at [https://www.icc-cpi.int/CourtRecords/CR2020\\_00828.PDF](https://www.icc-cpi.int/CourtRecords/CR2020_00828.PDF) [<https://perma.cc/L7PZ-V3CT>] (describing the Pre-Trial Chamber’s opinion).

<sup>2</sup> *Id.*, paras. 19–46 (finding it was error for the Pre-Trial Chamber to deny the prosecutor’s request on the basis that “an investigation would not serve the interests of justice”).

<sup>3</sup> *Id.*, para. 79.

<sup>4</sup> See *id.*, paras. 65–78; see also Situation in the Islamic Republic of Afghanistan, ICC-02/17-7-Conf-Exp, Request for Authorisation of an Investigation Pursuant to Article 15, para. 49 (Nov. 20, 2017), available at <https://www.legal-tools.org/doc/db23eb/pdf> (identifying Poland, Romania, and Lithuania as countries where the CIA operated clandestine sites and subjected militants to acts constituting crimes over which the ICC has jurisdiction).

<sup>5</sup> See Jean Galbraith, Contemporary Practice of the United States, 113 AJIL 169 (2019) (discussing a 2018 speech by John Bolton, then the U.S. National Security Advisor, criticizing the ICC for attempting to investigate U.S. involvement in Afghanistan).

<sup>6</sup> See Jean Galbraith, Contemporary Practice of the United States, 113 AJIL 625 (2019).

<sup>7</sup> Donald J. Trump, Statement on the International Criminal Court’s Decision Not to Authorize an Investigation into the Situation in Afghanistan, 2019 DAILY COMP. PRES. DOC. NO. 224 (Apr. 12).

<sup>8</sup> U.S. Dep’t of State Press Release, Secretary Michael R. Pompeo at a Press Availability with Secretary of Defense Mark Esper, Attorney General William Barr, and National Security Advisor Robert O’Brien (June 11, 2020), at <https://www.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> [<https://perma.cc/H3CA-C2WZ>].

<sup>9</sup> *Id.*

maintains the right to try its own citizens and that they will never “be subjected to the judgments of unaccountable international bodies.”<sup>10</sup>

On June 11, 2020, Trump issued an executive order declaring a national emergency with respect to the ICC’s actions and authorizing economic sanctions and visa restrictions against those involved in conducting investigations against U.S. personnel or against the personnel of a U.S. ally without that ally’s consent.<sup>11</sup> The Executive Order authorizes economic sanctions against “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.<sup>12</sup>

Additionally, those persons who fit the above criteria and their immediate family members could also be denied “unrestricted immigrant and nonimmigrant entry into the United States.”<sup>13</sup>

<sup>10</sup> *Id.*

<sup>11</sup> Exec. Order No. 13,928, 85 Fed. Reg. 36,139 (June 11, 2020); see also Uzay Yasar Aysev, *Can the International Criminal Court Hold the Trump Administration in Contempt?*, JUST SECURITY (June 30, 2020), at <https://www.justsecurity.org/71498/can-the-international-criminal-court-hold-the-trump-administration-in-contempt> (noting that the reference to U.S. allies is probably meant to refer to Israel, given the ICC investigation into the situation in Palestine). Although Trump authorized sanctions, the executive branch did not immediately specify any persons to whom these sanctions would apply in practice. See Rob Berschinski, *Trump’s ICC EO Will Undercut All U.S. Sanctions Programs—Is that Why Treasury Isn’t Conspicuously on Board?*, JUST SECURITY (June 16, 2020), at <https://www.justsecurity.org/70796/trumps-icc-EO-will-undercut-all-u-s-sanctions-programs-is-that-why-treasury-isnt-conspicuously-on-board>. On September 2, Trump administration officials announced the imposition of certain sanctions—most notably on Bensouda and on Phakiso Mochochoko, the Director of the Jurisdiction, Complementarity and Cooperation Division within the Office of the Prosecutor. Haley S. Anderson, *Why Them? On the U.S. Sanctions Against Int’l Crim. Court Officials*, JUST SECURITY (Sept. 2, 2020), at <https://www.justsecurity.org/72275/why-them-on-the-u-s-sanctions-against-intl-criminal-court-officials>.

<sup>12</sup> Exec. Order No. 13,928, *supra* note 11. The Executive Order also bans donations and contributions of funds, goods, or services to these individuals. *Id.*; see also David Scheffer, *The Self-Defeating Executive Order Against the International Criminal Court*, JUST SECURITY (June 12, 2020), at <https://www.justsecurity.org/70742/the-self-defeating-executive-order-against-the-international-criminal-court> (considering that the sanctions are so sweeping that even lawyers who file amicus briefs could be targeted).

<sup>13</sup> Exec. Order No. 13,928, *supra* note 11 (also authorizing the secretary of state to restrict entry of agents of the ICC into the United States if he or she determines this entry to be “detrimental to the interests of the United States”).



Trump invoked the International Emergency Economic Powers Act (IEEPA) in his authorization of economic sanctions.<sup>14</sup> The IEEPA empowers the president to regulate the use of any property within U.S. jurisdiction “in which any foreign country or a national thereof has any interest,”<sup>15</sup> but only when the president does so to address “an unusual and extraordinary threat with respect to which a national emergency has been declared.”<sup>16</sup> When the IEEPA was first enacted in 1977, presidents largely targeted foreign governments and geographical regions.<sup>17</sup> Since then, presidents have increasingly targeted “groups and individual persons . . . engaged in specific activities.”<sup>18</sup> This Executive Order is the first such order invoking the IEEPA to target individuals for their participation in an international organization.<sup>19</sup>

In response, the ICC issued a statement “express[ing] profound regret at the announcement of further threats and coercive actions . . . against the Court and its officials.”<sup>20</sup> The statement continued:

These are the latest in a series of unprecedented attacks on the ICC, an independent international judicial institution, as well as on the Rome Statute system of international criminal justice, which reflects the commitment and cooperation of the ICC’s 123 State Parties, representing all regions of the world.

These attacks constitute an escalation and an unacceptable attempt to interfere with the rule of law and the Court’s judicial proceedings. They are announced with the declared aim of influencing the actions of ICC officials in the context of the Court’s independent and objective investigations and impartial judicial proceedings.

An attack on the ICC also represents an attack against the interests of victims of atrocity crimes, for many of whom the Court represents the last hope for justice.<sup>21</sup>

On the day before the Executive Order issued, ten states parties to the Rome Statute who are presently members of the UN Security Council issued a joint statement reiterating their commitment to the ICC and to preserving its independence.<sup>22</sup>

<sup>14</sup> *See id.*

<sup>15</sup> 50 U.S.C. § 1702(a)(1)(B).

<sup>16</sup> *Id.* § 1701(b).

<sup>17</sup> CHRISTOPHER A. CASEY, IAN F. FERGUSSON, DIANNE E. RENNACK & JENNIFER K. ELSEA, CONG. RESEARCH SERV., R45618, THE INTERNATIONAL EMERGENCY ECONOMIC POWERS ACT: ORIGINS, EVOLUTION, AND USE 22 (2020), available at <https://fas.org/sgp/crs/natsec/R45618.pdf> [<https://perma.cc/EJ27-SRM6>].

<sup>18</sup> *Id.* at 23.

<sup>19</sup> *See id.* at 16, fig. 1 (documenting every executive order invoking the IEEPA since its enactment).

<sup>20</sup> Int’l Criminal Court Press Release, Statement of the International Criminal Court on Recent Measures Announced by the US (June 11, 2020), at <https://www.icc-cpi.int/Pages/item.aspx?name=200611-icc-statement>.

<sup>21</sup> *Id.*; *see also* Int’l Criminal Court Press Release, ASP President O-Gon Kwon Rejects Measures Taken Against ICC (June 11, 2020), at <https://www.icc-cpi.int/Pages/item.aspx?name=pr1527> [<https://perma.cc/PVS2-8FJD>] (“deeply regret[ting]” the U.S. actions).

<sup>22</sup> United Nations, *International Criminal Court Members of the Council on the ICC and Sudan – Virtual Media Stakeout*, YOUTUBE (June 10, 2020), at <https://www.youtube.com/watch?v=FVEKk1hcRhA>. The executive order also drew sharp criticism from commentators. *See, e.g.*, Diane Marie Amann, *I Help Children in Armed Conflict. The President Is Forcing Me to Stop*, JUST SECURITY (June 29, 2020), at <https://www.justsecurity.org/71048/i-help-children-in-armed-conflict-the-president-is-forcing-me-to-stop>; Scheffer, *supra* note 12 (criticizing the U.S. justification for sanctions as “hyperbolically-charged words of scant truth or meaning”); Berschinski, *supra* note 11 (arguing that the executive order will “delegitimize[e]” U.S. sanctions programs).

## USE OF FORCE, ARMS CONTROL, AND NONPROLIFERATION

*United States Gives Notice of Withdrawal from Treaty on Open Skies*

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On May 21, 2020, U.S. Secretary of State Mike Pompeo announced that the United States would withdraw from the Treaty on Open Skies. The treaty, which has been ratified by several former Soviet Republics and most North Atlantic Treaty Organization (NATO) members, allows states parties to conduct observation flights over each other's territory to build trust and transparency with respect to arms control. The treaty gives state parties a right to withdraw upon six months of notice, which Pompeo stated would be formally given by the United States on May 22. Pompeo described the U.S. withdrawal as a response to Russian violations of the treaty and held open the possibility that the United States would rescind its notice of withdrawal in the event of full Russian compliance. U.S. allies in Europe reaffirmed their own commitment to the treaty and to working with Russia over disputes arising from it. The announced U.S. withdrawal raises significant issues of U.S. domestic law, as the Trump administration did not comply with preconditions to withdrawal that had been established by Congress in the National Defense Authorization Act for Fiscal Year 2020.

The impetus behind the Treaty on Open Skies, commonly known as the Open Skies Treaty, originated with President Eisenhower.<sup>1</sup> His proposal sought to ease tensions between the United States and the Soviet Union by allowing the two countries to conduct observation flights over each other's territories, thus minimizing the opportunity for either country to launch surprise military attacks against the other.<sup>2</sup> The Soviet Union rejected Eisenhower's proposal, but President George H.W. Bush successfully restarted negotiations in 1989.<sup>3</sup> The Open Skies Treaty entered into force on January 1, 2002, almost a decade after the United States, Russia, and twenty-two other countries signed it on March 24, 1992.<sup>4</sup> The treaty aims to "improve openness and transparency, to facilitate the monitoring of compliance with existing or future arms control agreements and to strengthen the capacity for conflict prevention and crisis management."<sup>5</sup> Under the Open Skies Treaty, parties can conduct a predetermined number of observation flights over other parties' territories, and they must also accept a certain number of flights from other parties.<sup>6</sup> Each party has a right to withdraw from the treaty,

<sup>1</sup> David E. Sanger, *Trump Will Withdraw from Open Skies Arms Control Treaty*, N.Y. TIMES (May 21, 2020), at <https://www.nytimes.com/2020/05/21/us/politics/trump-open-skies-treaty-arms-control.html>; AP Archive, *The States Policy on Spies and Open Skies*, YOUTUBE (July 31, 2015), at <https://www.youtube.com/watch?v=4DH3e9WJMQU>.

<sup>2</sup> Sanger, *supra* note 1.

<sup>3</sup> AMY F. WOOLF, CONG. RESEARCH SERV., IN10502, THE OPEN SKIES TREATY: BACKGROUND AND ISSUES 1 (2020), available at <https://fas.org/sgp/crs/nuke/IN10502.pdf> [<https://perma.cc/XZ78-JGPB>].

<sup>4</sup> *Id.* The Open Skies Treaty currently has thirty-four states parties. Glob. Aff. Can., *Depository Status for the Treaty on Open Skies*, at <https://www.treaty-accord.gc.ca/details.aspx?id=102747> [hereinafter *Depository Status for the Treaty on Open Skies*]. All NATO members are party to the treaty except for Albania, Montenegro, and North Macedonia, as are several former Soviet Republics and several other European states. *See id.*; NATO, *Member Countries* (Mar. 24, 2020), [https://www.nato.int/cps/en/natohq/topics\\_52044.htm](https://www.nato.int/cps/en/natohq/topics_52044.htm).

<sup>5</sup> Treaty on Open Skies, pmbl., para. 6, Mar. 24, 1992, S. Treaty Doc. No. 102-37 (1993).

<sup>6</sup> *Id.* Art. 3, § 1, paras. 1–2. Observation flights conducted under the Open Skies Treaty are heavily regulated. *See, e.g., id.* Art. 4 (stipulating the types of sensors allowable for observation aircrafts and the performance limits for



but it must “provide notice of its decision to withdraw to either Depositary at least six months in advance of the date of its intended withdrawal and to all other States Parties.”<sup>7</sup>

Secretary of State Mike Pompeo announced on May 21, 2020, that the United States would withdraw from the Open Skies Treaty, remarking that a formal notice of withdrawal would be submitted the following day.<sup>8</sup> Pompeo stated in part:

While the United States along with our Allies and partners that are State Parties to the Treaty have lived up to our commitments and obligations under the Treaty, Russia has flagrantly and continually 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 aspirations 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.<sup>9</sup>

such sensors); *id.* Art. 6 (detailing the way in which observation flights are to be conducted); *id.* Art. 9 (regulating the handling of data collected from sensors).

<sup>7</sup> *Id.* Art. 15.2. The depositaries for the Open Skies Treaty are Canada and Hungary. *Id.* Art. 17.1. Once the depositaries receive a notice of withdrawal, they must notify other states parties and convene a conference among all state parties between thirty and sixty days after receipt of the notice. *Id.* Art. 15.3.

<sup>8</sup> U.S. Dep’t of State Press Release, Michael R. Pompeo, Sec’y of State, On the Treaty on Open Skies (May 21, 2020), at <https://www.state.gov/on-the-treaty-on-open-skies> [<https://perma.cc/7B7D-S5JK>] [hereinafter Treaty Withdrawal Announcement]. As of August 17, 2020, Canada has not updated its depositary status web page to reflect having received a U.S. communication regarding withdrawal. Depositary Status for the Treaty on Open Skies, *supra* note 4. Pompeo’s announcement came after many signals from the Trump administration—going back at least to the fall of 2019—that withdrawal was under consideration. *See, e.g.*, U.S. House of Representatives Comm. on Foreign Affairs Press Release, Engel Denounces Trump Administration Potential Plans to Withdraw from Open Skies Treaty (Oct. 7, 2019), at <https://foreignaffairs.house.gov/2019/10/engel-denounces-trump-administration-potential-plans-to-withdraw-from-open-skies-treaty> [<https://perma.cc/X6ST-BGYT>].

<sup>9</sup> Treaty Withdrawal Announcement, *supra* note 8 (also referring briefly to earlier violations). As part of a separate briefing, U.S. Assistant Secretary for International Security and Nonproliferation Christopher A. Ford listed various Russian violations of the Open Skies Treaty that had occurred at earlier points of time, going back to 2005. U.S. Dep’t of State Press Release, Briefing with Special Presidential Envoy for Arms Control Marshall Billingslea and Assistant Secretary for International Security and Nonproliferation Dr. Christopher A. Ford on the Treaty on Open Skies (May 21, 2020), at <https://www.state.gov/briefing-with-special-presidential-envoy-for-arms-control-marshall-billingslea-and-assistant-secretary-for-international-security-and-nonproliferation-dr-christopher-a-ford-on-the-treaty-on-ope> [<https://perma.cc/C4WF-5RMU>]. The United States had responded to certain

Pompeo also asserted that Russia has “*weaponized* the Treaty by making it into a tool of intimidation and threat,” alleging that Russia had been undertaking observation flights to map out areas in the United States and Europe for targeting in potential military campaigns.<sup>10</sup> Noting that U.S. allies “still find value in the Treaty,” he rejected remaining in the treaty “in order to maintain an empty façade of cooperation with Moscow.”<sup>11</sup>

Pompeo expressly mentioned the possibility that the United States might change course and remain in the Open Skies Treaty, should Russia “demonstrate[] a return to full compliance with this confidence-building Treaty.”<sup>12</sup> In a brief exchange with reporters that same day, President Trump similarly observed that “until they adhere, we will pull out” but that “there’s a very good chance we’ll make a new agreement or do something to put that agreement back together.”<sup>13</sup> Nonetheless, White House aides have indicated that the United States is unlikely to reconsider its planned withdrawal.<sup>14</sup>

After Pompeo’s announcement, twelve European countries issued a joint statement expressing regret over the U.S. decision.<sup>15</sup> The countries acknowledged sharing U.S. “concerns about implementation of the Treaty clauses by Russia,” but reaffirmed their commitment to the Open Skies Treaty as “functioning and useful.”<sup>16</sup> NATO Secretary General Jens Stoltenberg issued a statement observing that the United States had left the door open to revisiting its decision and that “NATO Allies and partner nations have engaged with Russia . . . to seek Russia’s return to compliance at the earliest date possible.”<sup>17</sup> German

Russian restrictions on overflights in the past by imposing its own restrictions on overflights conducted over Hawaii and prohibiting flights over two U.S. Air Force bases. WOOLF, *supra* note 3, at 2. In response to Pompeo’s accusations, the Russian Ministry of Foreign Affairs issued a press release describing several U.S. violations of the Open Skies Treaty. Ministry of Foreign Affairs of the Russian Fed’n Press Release, Treaty on Open Skies: Questions and Answers (May 26, 2020), at [https://www.mid.ru/en/foreign\\_policy/international\\_safety/regprla/-/asset\\_publisher/YCxLFJnKuD1W/content/id/4138584](https://www.mid.ru/en/foreign_policy/international_safety/regprla/-/asset_publisher/YCxLFJnKuD1W/content/id/4138584) [<https://perma.cc/GY43-A3MR>].

<sup>10</sup> See Treaty Withdrawal Announcement, *supra* note 8; but see Justin Key Canfil, *The U.S. Will Exit the Open Skies Treaty and It’s Unclear Why*, LAWFARE (June 3, 2020), at <https://www.lawfareblog.com/us-will-exit-open-skies-treaty-and-its-unclear-why> (noting that, on this issue, “detailed allegations are scant, at least at the open-source level” and that in any event the treaty does not prohibit such use of observational information).

<sup>11</sup> Treaty Withdrawal Announcement, *supra* note 8.

<sup>12</sup> *Id.*

<sup>13</sup> Remarks and an Exchange with Reporters Prior to Departure for Ypsilanti, Michigan, 2020 DAILY COMP. PRES. DOC. 387, at 1 (May 21).

<sup>14</sup> Sanger, *supra* note 1. This may be particularly true given that the U.S. announcement of withdrawal occurred despite several conciliatory signals sent by Russia in the spring of 2020. *E.g.*, U.S. Dep’t of State Press Release, James Gilmore, U.S. Ambassador to the OSCE, Briefing with U.S. Ambassador to the OSCE James Gilmore (Mar. 2, 2020), at <https://www.state.gov/briefing-with-u-s-ambassador-to-the-osce-james-gilmore> (noting that Russia had recently allowed an overflight “near Kaliningrad, which has always been somewhat of a sticking point” and that Russia had stated that it would roll back its “reluctance to let us fly over one of their major exercises”). Moreover, several of the ongoing violations described by Pompeo relate to disputes that go beyond the Open Skies Treaty, such as the status of Crimea.

<sup>15</sup> Ministry for Europe and Foreign Affairs Press Release, Statement of the Foreign Ministries of France, Belgium, Czech Republic, Finland, Germany, Greece, Italy, Luxembourg, Netherlands, Portugal, Spain, and Sweden on the Announcement by the US to Withdraw from the Open Skies Treaty (May 22, 2020), at <https://www.diplomatie.gouv.fr/en/french-foreign-policy/security-disarmament-and-non-proliferation/news/news-about-defence-and-security/article/statement-of-the-foreign-ministries-of-france-belgium-czech-republic-finland> [<https://perma.cc/5DBH-4MVV>].

<sup>16</sup> *Id.*

<sup>17</sup> NATO Press Release, Jens Stoltenberg, Sec’y Gen. of the N. Atl. Treaty Org., Statement by the NATO Secretary General on the Open Skies Treaty (May 22, 2020), at <https://nato.cmail19.com/t/ViewEmail/t/>

Foreign Minister Heiko Maas issued a separate statement criticizing the U.S. decision and urging the United States to reconsider.<sup>18</sup> Maas stated that the concerns raised about Russian compliance do not warrant U.S. withdrawal, a view he and the foreign ministers of “France, Poland and the UK have repeatedly informed US Secretary of State Pompeo.”<sup>19</sup> The Russian deputy minister of foreign affairs denied U.S. allegations that Russia had violated the Treaty and characterized the dispute as stemming from the Trump administration’s misrepresentation of “technical issues” as treaty violations.<sup>20</sup>

On July 6, 2020, a Conference of the Parties met virtually for “extensive discussions, which offered a broad range of views” related to the effects of a U.S. withdrawal.<sup>21</sup> This gathering was convened by Canada and Hungary, the depositaries for the Open Skies Treaty, who have a joint obligation under the treaty to convene such a conference between thirty and sixty days of receiving a notice of withdrawal.<sup>22</sup>

In addition to prompting international debate, the Trump administration’s decision to give notice of withdrawal presents significant issues as a matter of U.S. domestic law. The United States joined the Open Skies Treaty pursuant to the process set forth in Article II of the U.S. Constitution, with the Senate advising and consenting in 1993 to U.S. participation in the treaty.<sup>23</sup> It has become “established practice” that presidents may unilaterally withdraw the United States from Article II treaties, provided the withdrawal is consistent with international law.<sup>24</sup> But historical practice “does not establish that this [unilateral power] is an exclusive presidential power,” and withdrawal could “possibly [be limited] by Congress through statute.”<sup>25</sup>

In 2019, Congress passed a statutory provision that requires the executive branch to notify Congress at least 120 days before submitting a formal notice of withdrawal from the Open Skies Treaty. Section 1234 of National Defense Authorization Act for Fiscal Year 2020 states:

- (a) NOTIFICATION REQUIRED.—Not later than 120 days before the provision of notice of intent to withdraw the United States from the Open Skies Treaty to either treaty depository pursuant to Article XV of the Treaty, the Secretary of Defense and the Secretary of State shall jointly submit to the congressional defense committees, the

2033286A5B1B26532540EF23F30FEDED/726C13780B153887419C69E1CEBE89F9 [https://perma.cc/9N5Z-8PNS].

<sup>18</sup> Federal Foreign Office Press Release, Foreign Minister Maas on America’s Announcement that It Intends to Withdraw from the Open Skies Treaty (May 21, 2020), at <https://www.auswaertiges-amt.de/en/newsroom/news/maas-open-skies/2343744> [https://perma.cc/T6UJ-ME22].

<sup>19</sup> *Id.*

<sup>20</sup> *Russia Calls U.S. Leaving Open Skies Treaty a “Blow” to European Security*, MOSCOW TIMES (May 22, 2020), at <https://www.themoscowtimes.com/2020/05/21/russia-calls-us-leaving-open-skies-treaty-a-blow-to-european-security-a70345>.

<sup>21</sup> Organization for Security and Co-operation in Europe Press Release, Conference of State Parties to the Open Skies Treaty Discusses U.S. Intent to Withdraw from the Treaty (July 7, 2020), at <https://www.osce.org/oscc/456646>.

<sup>22</sup> *Id.*; see also Treaty on Open Skies, *supra* note 5, Art. 15.3.

<sup>23</sup> See U.S. CONST. Art. II § 2; 139 Cong. Rec. 19913 (1993) (documenting the Senate’s resolution of advice and consent).

<sup>24</sup> RESTATEMENT (FOURTH) OF FOREIGN RELATIONS LAW § 313.1 (2018).

<sup>25</sup> *Id.* § 313 Reporters’ Note 6 (noting that such a limitation could occur if the power to withdraw the United States from treaties is shared between Congress and the president rather than exclusive to the president).

Committee on Foreign Affairs of the House of Representatives, and the Committee on Foreign Relations of the Senate a notification that—

- (1) such withdrawal is in the best interests of the United States national security; and
- (2) the other state parties to the Treaty have been consulted with respect to such withdrawal.<sup>26</sup>

Prior to the enactment of this statutory provision, and also in a presidential signing statement, the Trump administration signaled that it would not view this provision as a constitutional limit on presidential power.<sup>27</sup>

The Trump administration did not provide Congress with notification pursuant to Section 1234(a) before giving notice of the U.S. withdrawal from the Open Skies Treaty.<sup>28</sup> It thus ignored the additional four-month period that the statute sought to embed into the withdrawal process—and, in the process, the administration ensured that withdrawal would be complete before the start of the next U.S. presidential term in January of 2021. In a letter to Pompeo on May 28, 2020, the House Foreign Affairs Committee “strongly condemn[ed] the Administration’s decision to submit the notice of intent to withdraw from the Open Skies Treaty” and objected to its “violation of the law under section 1234 of the Fiscal Year 2020 National Defense Authorization Act.”<sup>29</sup> The letter observed:

[W]e reject the Administration’s claim that the Constitution entitles the President to violate statutory law by refusing to submit advance notification of this withdrawal to Congress. The House and Senate rejected this claim of unchecked executive authority through bipartisan passage of section 1234. . . . With the passage of this law, Congress made clear that it would need adequate notice of withdrawal from this long-standing treaty to effectively carry out its responsibilities under Article I of the Constitution. The Administration’s lack of transparency with Congress only underscores

<sup>26</sup> National Defense Authorization Act for Fiscal Year 2020, Pub. L. No. 116-92, § 1234, 133 Stat. 1198 (2019) [hereinafter 2020 NDAA].

<sup>27</sup> Prior to the statute’s enactment, the Department of Justice sent a letter stating, with respect to a closely related provision that did not end up in the final statute, that “[w]e are aware of no legal precedent holding that Congress may prevent the President from withdrawing the United States from a treaty. We regard the absence of any historical precedent of this nature as significant evidence that Congress may not restrict the President in this manner.” Letter from Prim F. Escalona, Principal Deputy Assistant Attorney Gen., U.S. Dep’t of Justice, to Adam Smith, Chairman, U.S. House Comm. on Armed Servs. 9 (Nov. 27, 2019) (citations omitted), at <https://www.justice.gov/ola/page/file/1222061/download> [<https://perma.cc/QH7T-5B4U>]. When Trump signed the statute into law, he asserted in a signing statement that notification provisions like the one in Section 1234(a) “encompass only actions for which such advance certification or notification is feasible and consistent with the President’s exclusive constitutional authorities as Commander in Chief and as the sole representative of the Nation in foreign affairs.” Statement on Signing the National Defense Authorization Act for Fiscal Year 2020, 2019 DAILY COMP. PRES. DOC. 880, at 1 (Dec. 20).

<sup>28</sup> Letter from Eliot L. Engel, Chairman of the U.S. House of Representatives Comm. on Foreign Affairs, et al. to Michael R. Pompeo, Sec’y of State (May 28, 2020), available at [https://foreignaffairs.house.gov/\\_cache/files/4/e/4e40c643-e16c-48a1-b659-56829784ec42/406F3B8C8449002D5B909981E306B67B.5-28-2020-hfac-dem-letter-to-pompeo-on-ost-all-sigs-.pdf](https://foreignaffairs.house.gov/_cache/files/4/e/4e40c643-e16c-48a1-b659-56829784ec42/406F3B8C8449002D5B909981E306B67B.5-28-2020-hfac-dem-letter-to-pompeo-on-ost-all-sigs-.pdf) [<https://perma.cc/DJV6-XSS9>].

<sup>29</sup> *Id.*

the degree to which the withdrawal decision was poorly considered and detrimental to our interests.<sup>30</sup>

It remains to be seen whether this conflict between Congress and the Trump administration will result in litigation or other further action.<sup>31</sup>

Aside from the Open Skies Treaty, Trump has already withdrawn the United States from numerous international commitments, including, with respect to arms control, the Joint Comprehensive Plan of Action and the Intermediate-Range Nuclear Forces Treaty.<sup>32</sup> These withdrawals also make it doubtful that the administration will renew the New Strategic Arms Reduction Treaty (New START), a treaty that sets limits on the maximum number of nuclear arms the United States and Russia can maintain and that expires on February 5, 2021.<sup>33</sup>

<sup>30</sup> *Id.* By contrast, the Senate Foreign Relations Committee has not released a similar statement. Instead, the Chairman of the Committee announced his support for the withdrawal, while a ranking member of the Committee denounced the decision as illegal. U.S. Senate Comm. on Foreign Relations Press Release, Chairman Risch Statement on Administration's Decision to Withdraw from Open Skies Treaty (May 21, 2020), at <https://www.foreign.senate.gov/press/chair/release/chairman-risch-statement-on-administrations-decision-to-withdraw-from-open-skies-treaty> [<https://perma.cc/5FKZ-939M>]; U.S. Senate Comm. on Foreign Relations Press Release, Ranking Member Menendez Statement on Trump Administration's Withdrawal from the Open Skies Treaty (May 21, 2020), at [https://www.foreign.senate.gov/press/ranking/release/ranking-member-menendez\\_statement-on-trump-administrations-withdrawal-from-the-open-skies-treaty](https://www.foreign.senate.gov/press/ranking/release/ranking-member-menendez_statement-on-trump-administrations-withdrawal-from-the-open-skies-treaty) [<https://perma.cc/4T9D-B53K>].

<sup>31</sup> See Scott R. Anderson & Pranay Vaddi, *When Can the President Withdraw from the Open Skies Treaty?*, LAWFARE (Apr. 22, 2020), at <https://www.lawfareblog.com/when-can-president-withdraw-open-skies-treaty> (arguing that such litigation would be fraught with justiciability issues and observing that a court might find on the merits that section 1234 “does not expressly prohibit withdrawal until [the notification] requirement is fulfilled”).

<sup>32</sup> Jean Galbraith, *Contemporary Practice of the United States*, 112 AJIL 514, 517–18 (2018); Jean Galbraith, *Contemporary Practice of the United States*, 113 AJIL 631, 631 (2019).

<sup>33</sup> Treaty Between the United States of America and the Russian Federation on Measures for the Further Reduction and Limitation of Strategic Offensive Arms, U.S.-Russ., Apr. 8, 2010, S. TREATY DOC. NO. 111-5 (2010); AMY F. WOOLF, CONG. RESEARCH SERV., R41219, THE NEW START TREATY: CENTRAL LIMITS AND KEY PROVISIONS 1 (2020), available at <https://fas.org/sgp/crs/nuke/R41219.pdf> [<https://perma.cc/7VEW-2TL5>]. Though the Trump administration has signaled its interest in negotiating with Russia to extend the New START Treaty, it has demanded that China be included in the negotiations. U.S. Dep't of State Press Release, Online Press Briefing with Ambassador Marshall Billingslea, Special Presidential Envoy for Arms Control, and Lieutenant General Thomas A. Bussiere, Deputy Commander, United States Strategic Command (USSTRATCOM) (June 24, 2020), at <https://www.state.gov/online+press+briefing+with+ambassador-marshall-billingslea-special-presidential-envoy-for-arms-control-and-lieutenant-general-thomas-a-bussiere-deputy-commander-united-states-strategic-command> [<https://perma.cc/4X4P-45UA>].