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### Contemporary Practice of the United States Relating to International Law (112:3 Am J Int'l L)

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

EDITED BY JEAN GALBRAITH\*

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\* Maura Douglas, Patricia Liverpool, David Peters, Sabrina Ruchelli, Jenna Smith, Kristen Dewilde, and Brian Yeh contributed to the preparation of this section.

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

*Congress Enacts the Clarifying Lawful Overseas Use of Data (CLOUD) Act, Reshaping U.S. Law Governing Cross-Border Access to Data*

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On March 22, 2018, Congress passed a \$1.3 trillion omnibus spending bill that President Trump signed into law the following day, thus narrowly avoiding a government shutdown.<sup>1</sup> Included within the voluminous bill is the Clarifying Lawful Overseas Use of Data (CLOUD) Act,<sup>2</sup> which enhances both the United States' and foreign nations' access to cross-border electronic data for law enforcement purposes.<sup>3</sup>

Prompted by the challenge of collecting “electronic evidence necessary to enforce essential laws in an increasingly international and digital age,” the CLOUD Act makes two distinct yet related changes to the law governing cross-border access to data in criminal investigations.<sup>4</sup> First, the Act amends the Stored Communications Act (SCA)—a “dense and confusing” statutory scheme that protects “the privacy of stored Internet communications”<sup>5</sup>—by “explicitly requiring providers subject to the jurisdiction of the United States to produce data pursuant to appropriate SCA process, even if the provider chooses to store that data outside the United States.”<sup>6</sup> The SCA had been passed in 1986 as part of a larger bill, the Electronic Communications Privacy Act (ECPA).<sup>7</sup> As a second change, the CLOUD Act amends several other provisions of the ECPA to create a framework that allows U.S. service providers to disclose U.S.-stored data to certain foreign countries pursuant to lawful foreign orders.<sup>8</sup> According to Acting Deputy Assistant Attorney General Richard Downing, the provisions together “build a new framework for effective, efficient cross-border access to data that protects both legitimate privacy interests and our public safety and national security, and benefits U.S. business interests as well.”<sup>9</sup>

<sup>1</sup> Consolidated Appropriations Act of 2018, Pub. L. No. 115-141, 132 Stat. 348 (2018) [hereinafter 2018 Appropriations Act]; see also Julie Hirschfield Davis & Michael D. Shear, *Trump Signs Spending Bill, Reversing Veto Threat and Avoiding Government Shutdown*, N.Y. TIMES (Mar. 23, 2018), at <https://www.nytimes.com/2018/03/23/us/politics/trump-veto-spending-bill.html>.

<sup>2</sup> 2018 Appropriations Act, *supra* note 1, div. 5; see also Robyn Greene, *Somewhat Improved, the CLOUD Act Still Poses a Threat to Privacy and Human Rights*, JUST SECURITY (Mar. 23, 2018), at <https://www.justsecurity.org/54242/improved-cloud-act-poses-threat-privacy-human-rights> (observing that, as a “quintessential must-pass bill,” the “2,232 page omnibus bill to fund the government” was used “as a vehicle to quietly pass through the controversial CLOUD Act”).

<sup>3</sup> *Data Stored Abroad: Ensuring Lawful Access and Privacy Protection in the Digital Era: Hearing Before the H. Comm. on the Judiciary*, 115th Cong. 15 (2017) (statement of Richard W. Downing, Acting Deputy Assistant Attorney General, Dep't of Justice) [hereinafter Downing Testimony].

<sup>4</sup> *Id.* at 7.

<sup>5</sup> Orin S. Kerr, *A User's Guide to the Stored Communications Act, and a Legislator's Guide to Amending It*, 72 GEO. WASH. L. REV. 1208, 1208 (2004).

<sup>6</sup> Downing Testimony, *supra* note 3, at 11.

<sup>7</sup> Electronic Communications Privacy Act of 1986, Pub. L. 99-508, 100 Stat. 1848, 1860 (1986); see also Kerr, *supra* note 5, at 1208 n.2 (noting the various names used for the SCA over time).

<sup>8</sup> Downing Testimony, *supra* note 3, at 13.

<sup>9</sup> *Id.* at 2.

The Obama administration first introduced draft legislation for what would become the CLOUD Act on July 15, 2016.<sup>10</sup> Originally, the proposed legislation did not include language addressing how the SCA applied to data stored abroad by U.S. communications service providers. But the day before the draft legislation was to be released, the Second Circuit held in *Microsoft Corp. v. United States* that the SCA did not authorize the issuance of a warrant to obtain data held by a U.S. provider where this data was stored abroad—in this case, in Ireland.<sup>11</sup> Even though the Department of Justice petitioned for and obtained Supreme Court review of the decision,<sup>12</sup> the *Microsoft* holding prompted the Obama and then the Trump administrations to seek a legislative fix. As Assistant Attorney General Peter Kadzik explained in a cover letter accompanying the initial draft legislation:

Yesterday, the United States Court of Appeals for the Second Circuit held in *Microsoft Corp. v. United States* that section 2703 of ECPA does not authorize our courts to issue and enforce warrants served on U.S. providers to obtain electronic communications stored abroad. If the decision stands[,] . . . [t]he Administration intends to promptly submit legislation to Congress to address the significant public safety implications of the *Microsoft* decision. This will be a necessary addition to the proposal that we are submitting today.<sup>13</sup>

The CLOUD Act—enacted a mere three weeks after the Supreme Court heard oral arguments in *Microsoft Corp.*, but before a decision was handed down<sup>14</sup>—resolved the issue of the SCA’s application to data stored abroad by U.S. providers and thus mooted the pending controversy.<sup>15</sup> Congress added a provision to the SCA clarifying that:

<sup>10</sup> Letter from Peter J. Kadzik, Assistant Attorney General, Dep’t of Justice, to Hon. Joseph R. Biden, President, U.S. Senate 3–4 (July 15, 2016), available at <https://www.documentcloud.org/documents/2994379-2016-7-15-US-UK-Biden-With-Enclosures.html#document/p1> [<https://perma.cc/7WGW-5D6G>] [hereinafter Kadzik Letter]; see also David Kris, *U.S. Government Presents Draft Legislation for Cross-Border Data Requests*, LAWFARE (July 16, 2016), at <https://www.lawfareblog.com/us-government-presents-draft-legislation-cross-border-data-requests>.

<sup>11</sup> 829 F.3d 197 (2d Cir. 2016).

<sup>12</sup> *United States v. Microsoft Corp.*, 138 S. Ct. 356 (2017) (*cert. granted*).

<sup>13</sup> Kadzik Letter, *supra* note 10, at 2–3; see also Downing Testimony, *supra* note 3, at 2 (including within the proposal to Congress “legislation to fix the problems created by the *Microsoft* decision”).

<sup>14</sup> See Nina Totenberg, *A Needle in a Legal Haystack Could Sink a Major Supreme Court Privacy Case*, NPR (Mar. 28, 2018), at <https://www.npr.org/2018/03/28/597444394/a-needle-in-a-legal-haystack-could-sink-a-major-supreme-court-privacy-case> (noting that “a Congress famous for gridlock passed legislation to modernize” the SCA “just three weeks after the Supreme Court argument”).

<sup>15</sup> Following the passage of the CLOUD Act, the U.S. Department of Justice obtained a new warrant for the Microsoft data stored abroad. See Motion to Vacate the Judgment of the Court of Appeals and Remand the Case with Directions to Dismiss as Moot, 2, *United States v. Microsoft Corp.*, No. 17-2 (Mar. 30, 2018). The Solicitor General then petitioned the Court to vacate the judgment of the court of appeals and remand the case with directions to dismiss as moot because “Microsoft’s sole objection—that the prior warrant was impermissibly extraterritorial—no longer applies.” *Id.* at 1–2. Microsoft did not oppose the government’s request, “provided that the Court similarly vacates the opinion of the magistrate judge (as adopted by the District Court) that the Second Circuit reversed. . . .” Response to the United States’ Motion to Vacate and Remand with Directions to Dismiss as Moot, 2, *United States v. Microsoft Corp.*, No. 17-2 (Apr. 3, 2018).

On April 17, the Court issued a *per curiam* opinion agreeing “[n]o live dispute remains between the parties” and “[t]his case, therefore, has become moot.” *United States v. Microsoft Corp.*, 138 S. Ct. 1186, 1188 (2018) (*per curiam*). As such, the Court ruled “the judgment on review is accordingly vacated, and the case is remanded” to the court of appeals “with instructions first to vacate the District Court’s contempt finding and its denial of Microsoft’s motion to quash, then to direct the District Court to dismiss the case as moot.” *Id.*

A provider of electronic communication service or remote computing service shall comply with the obligations of this chapter to preserve, backup, or disclose the contents of a wire or electronic communication and any record or other information pertaining to a customer or subscriber within such provider's possession, custody, or control, *regardless of whether such communication, record, or other information is located within or outside of the United States*.<sup>16</sup>

Congress also created a limited mechanism for providers to challenge these warrants where applying the SCA to data stored overseas might create “conflicting legal obligations” by requiring “disclosure of electronic data that foreign law prohibits communications-service providers from disclosing.”<sup>17</sup> At present, this mechanism is a nascent one. It applies only where “qualifying foreign governments” are concerned, with such governments defined as ones with whom the United States has reached executive agreements on access to data.<sup>18</sup> As discussed below, no such agreements presently exist.<sup>19</sup> If such agreements are reached in the future, then, following a motion by the communications service provider, a reviewing court may modify or quash a warrant

only if the court finds that—(i) the required disclosure would cause the provider to violate the laws of a qualifying foreign government; (ii) based on the totality of the circumstances, the interests of justice dictate that the legal process should be modified or quashed; and (iii) the customer or subscriber is not a United States person and does not reside in the United States.<sup>20</sup>

In determining whether “the interests of justice dictate that the legal process should be modified or quashed,” Congress requires a reviewing court to conduct a “comity analysis.”<sup>21</sup> The reviewing court “shall take into account, as appropriate,” eight enumerated factors, including “the interests of the United States,” “the interests of the qualifying foreign government in preventing any prohibited disclosure,” and the “likelihood, extent, and nature of penalties to the provider or any employees of the provider as a result of inconsistent legal requirements imposed on the provider.”<sup>22</sup>

In addition to this limited mechanism, the CLOUD Act specifies that it does not “modify or otherwise affect the common law standards governing the availability or application of comity analysis.”<sup>23</sup> It remains to be seen whether challenges to particular warrants based

<sup>16</sup> 2018 Appropriations Act, *supra* note 1, div. 5, § 103(a)(1) (to be codified at 18 U.S.C. § 2713) (emphasis added). Downing's testimony indicates that the Department of Justice views this language as applicable to “providers subject to the jurisdiction of the United States.” See Downing Testimony, *supra* note 3, at 11.

<sup>17</sup> 2018 Appropriations Act, *supra* note 1, at div. 5, § 102(5). Downing testified that as of 2016 “[the Department of Justice] is not aware of any instance in which a provider has informed the Department or a court that production pursuant to the SCA of data stored outside the United States would place the provider in conflict with local law.” Downing Testimony, *supra* note 3, at 11.

<sup>18</sup> 2018 Appropriations Act, *supra* note 1, at div. 5, § 103(b) (to be codified at 18 U.S.C. § 2703(h)).

<sup>19</sup> See *infra* notes 29–48 and accompanying text.

<sup>20</sup> 2018 Appropriations Act, *supra* note 1, at div. 5, § 103(b) (to be codified at 18 U.S.C. § 2703(h)).

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* The mechanism to challenge extraterritorial warrants was a late addition to the CLOUD Act—the draft legislation introduced by both the Obama and Trump administrations did not include the provisions establishing it. See Kadzik Letter, *supra* note 10, at 4 (failing to include such provisions in draft legislation); see also Downing Testimony, *supra* note 3, at 24 (same).

<sup>23</sup> 2018 Appropriations Act, *supra* note 1, at div. 5, § 103(c).

on common-law comity principles will be made going forward, particularly in the wake of the recent implementation of the European Union's General Data Protection Regulation.<sup>24</sup>

Besides clarifying the scope of U.S. law enforcement's authority to access data stored abroad, the CLOUD Act also creates a framework to facilitate access by certain foreign governments to data stored by U.S. service providers in the United States. Kadzik explained the need for such a framework when introducing the draft legislation:

Foreign governments investigating criminal activities abroad increasingly require access to electronic evidence from U.S. companies that provide electronic communications services to millions of their citizens and residents. Such data is often stored or accessible only in the United States, where U.S. law, including the ECPA, limits the companies' ability to disclose it.<sup>25</sup>

According to Kadzik and others,<sup>26</sup> the current method for processing requests by foreign governments for U.S.-stored data—the use of Mutual Legal Assistance Treaties (MLATs)—is too labor intensive and time consuming to handle the “significant increases in the volume and complexity of requests . . . in the Internet Age.”<sup>27</sup>

The CLOUD Act thus allows U.S. providers to disclose data to a limited set of foreign governments who are targeting the accounts of non-U.S. persons located outside the United States.<sup>28</sup> A foreign government is eligible for such disclosures under the CLOUD Act only after entering into an “executive agreement” with the U.S. government.<sup>29</sup> Moreover, the attorney general must, with the concurrence of the secretary of state, submit a written certification to Congress that the “executive agreement” satisfies four statutory requirements set forth in the newly enacted 18 U.S.C. § 2523.<sup>30</sup>

<sup>24</sup> See Jennifer Daskal, *Microsoft Ireland, the CLOUD Act, and International Lawmaking 2.0*, 71 STAN. L. REV. ONLINE 9, 11–13 (2018) (noting potential tensions between this EU regulation and warrants that may be issued pursuant to the CLOUD Act).

<sup>25</sup> Kadzik Letter, *supra* note 10, at 1.

<sup>26</sup> Downing testified that the MLAT process is “not devised to handle the growing demands for digital evidence. Already, the Department faces significant challenges in responding to the enormous volume of foreign demands with the requisite speed.” Downing Testimony, *supra* note 3, at 7. For further discussion on how MLATs operate and the need for reform, see generally Peter Swire & Justin D. Hemmings, *Mutual Legal Assistance in an Era of Globalized Communications: The Analogy to the Visa Waiver Program*, 71 N.Y.U. ANN. SURV. AM. L. 687 (2016); Peter Swire, Justin Hemmings & Suzanne Vergnolle, *A Mutual Legal Assistance Case Study: The United States and France*, 34 WIS. INT'L L.J. 323 (2017).

<sup>27</sup> Kadzik Letter, *supra* note 10, at 1; see also Swire & Hemmings, *supra* note 26, at 700 (noting that on average the MLAT process takes approximately ten months to execute valid electronic evidence requests).

<sup>28</sup> See Downing Testimony, *supra* note 3, at 13. The CLOUD Act does not require disclosure as a matter of U.S. law, but where applicable it means that U.S. law will no longer operate as a bar to disclosure. See *id.*

<sup>29</sup> 2018 Appropriations Act, *supra* note 1, at div. 5, § 104 (to be codified in various sections of 28 U.S.C.); see also STEPHEN P. MULLIGAN, CONGRESSIONAL RESEARCH SERVICE REPORT ON CROSS-BORDER DATA SHARING UNDER THE CLOUD ACT 15–16 (Apr. 23, 2018), available at <https://fas.org/sgp/crs/misc/R45173.pdf> (concluding that the CLOUD Act “authorizes” such executive agreements and thus serves as a “source of authority” for the executive branch to enter into them). MLATs remain the vehicle for processing cross-border data requests for those nations that do not enter into the bilateral data-sharing agreements described in the CLOUD Act. See Downing Testimony, *supra* note 3, at 9.

<sup>30</sup> 2018 Appropriations Act, *supra* note 1, at div. 5, § 105 (to be codified at 18 U.S.C. § 2523). While the attorney general's determination “shall not be subject to judicial or administrative review,” the CLOUD Act creates expedited legislative procedures that Congress could use in passing a joint resolution of disapproval blocking the agreement within 180 days of the certification's submission to Congress. See *id.*

First, the attorney general must certify that “the domestic law of the foreign government, including the implementation of that law, affords robust substantive and procedural protections for privacy and civil liberties in light of the data collection and activities of the foreign government that will be subject to the agreement.”<sup>31</sup> Further, the statute enumerates specific “factors to be met in making such a determination,” including whether the foreign government “demonstrates respect for the rule of law and principles of nondiscrimination” and “adheres to applicable international human rights obligations and commitments or demonstrates respect for international universal human rights,” among others.<sup>32</sup>

Second, the attorney general must also certify that “the foreign government has adopted appropriate procedures to minimize the acquisition, retention, and dissemination of information concerning United States persons subject to the agreement.”<sup>33</sup> Third, “the terms of the agreement shall not create any obligation that providers be capable of decrypting data or limitation that prevents providers from decrypting data.”<sup>34</sup>

Fourth, and finally, the attorney general must certify that the executive agreement requires “any order that is subject to the agreement” to comply with several enumerated restrictions.<sup>35</sup> Among other requirements, the agreement must provide that “the foreign government may not intentionally target a United States person or a person located in the United States, and shall adopt targeting procedures designed to meet this requirement.”<sup>36</sup> Further, an order issued pursuant to the agreement “shall be for the purpose of obtaining information relating to . . . serious crime” and “shall be subject to review or oversight by a court, judge, magistrate, or other independent authority prior to, or in proceedings regarding, enforcement of the order.”<sup>37</sup> And, the “United States Government shall reserve the right to render the agreement inapplicable as to any order for which the United States Government concludes the agreement may not properly be invoked.”<sup>38</sup>

According to the executive branch, the CLOUD Act “meet[s] the legitimate public safety needs of other countries,” while “establish[ing] adequate baselines for protecting privacy and civil liberties.”<sup>39</sup> But the changes the CLOUD Act makes to the law of cross-border access to data has engendered substantial disagreement among scholars, industry, and civil liberty organizations as to whether the Act “is good for privacy and human rights.”<sup>40</sup> On the one hand, organizations including the Electronic Frontier Foundation and ACLU campaigned against the CLOUD Act on the grounds that the bill “fails to protect the rights of Americans and

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> Downing Testimony, *supra* note 3, at 13–14.

<sup>40</sup> Jennifer Daskal & Peter Swire, *Why the CLOUD Act is Good for Privacy and Human Rights*, LAWFARE (Mar. 14, 2018), at <https://lawfareblog.com/why-cloud-act-good-privacy-and-human-rights>. Criticism was also levied at the process of the CLOUD Act’s enactment: “It was never . . . marked up by any committee in either the House or the Senate. . . . It was robbed of a stand-alone floor vote because Congressional leadership decided, behind closed doors, to attach this unvetted, unrelated data bill to the \$1.3 trillion government spending bill.” David Ruiz, *Responsibility Deflected, the CLOUD Act Passes*, ELECTRONIC FRONTIER FOUND. (Mar. 22, 2018), at <https://www.eff.org/deeplinks/2018/03/responsibility-deflected-cloud-act-passes>.

individuals abroad, and would place too much authority in the hands of the executive branch with few mechanisms to prevent abuse.”<sup>41</sup> On the other hand, leading U.S. tech companies voiced public support for the CLOUD Act’s passage, arguing that it “reflects a growing consensus in favor of protecting Internet users around the world and provides a logical solution for governing cross-border access to data.”<sup>42</sup> And privacy scholars Jennifer Daskal and Peter Swire argue that the CLOUD Act improves “privacy and civil liberties protections compared to a world without such legislation” by “set[ting] critically important baseline substantive and procedural protections, while doing so in a way that is achievable and understandable to other rights-respecting nations.”<sup>43</sup>

The effect on digital privacy may be felt sooner rather than later, as the CLOUD Act’s enactment paves the way for the finalization of a bilateral data-sharing agreement between the United States and the United Kingdom. Prompted by the need to address the “untenable situation in which . . . Britain cannot quickly obtain data for domestic probes because it happens to be held by companies in the United States,” undisclosed negotiations between the two allies were underway at least by February of 2016.<sup>44</sup> American and British officials alike held up the potential U.S.–U.K. agreement as both a reason for passing the bill and a model for future bilateral executive agreements. As Downing testified during congressional hearings on the CLOUD Act:

Under this approach, the United States and a foreign government can negotiate a bilateral agreement setting forth the terms for cross-border access to data, but only with those countries who share the United States’ commitment to the rule of law and respect for privacy and civil liberties. . . . The United States has for some time been working on a proposed agreement of this sort with the United Kingdom, which has made clear that its inability to access data from U.S. providers in an efficient and effective way poses a very serious threat to public safety and national security in the United Kingdom. . . . If the approach proves successful, we would consider it for other appropriate countries as well.<sup>45</sup>

The CLOUD Act’s sponsor, Senator Orrin Hatch, called the U.S.–U.K. agreement “a model for future agreements between the United States and other countries” and advocated for

<sup>41</sup> CLOUD ACT Coalition Letter from ACLU et al. to U.S. Members of Congress 1 (Mar. 12, 2018), available at [https://www.aclu.org/sites/default/files/field\\_document/cloud\\_act\\_coalition\\_letter\\_3-8\\_clean.pdf](https://www.aclu.org/sites/default/files/field_document/cloud_act_coalition_letter_3-8_clean.pdf).

<sup>42</sup> Letter from Apple, Facebook, Google, Microsoft & Oath, to Doug Collins, Darrell Issa, Tom Marino, Hakeem Jeffries, Suzan DelBene & John Rutherford, Representatives, U.S. Congress (Feb. 6, 2018), available at <https://blogs.microsoft.com/datalaw/wp-content/uploads/sites/149/2018/02/Tech-Companies-Letter-of-Support-for-House-CLOUD-Act-020618.pdf>.

<sup>43</sup> Daskal & Swire, *supra* note 40.

<sup>44</sup> Ellen Nakashima & Andrea Peterson, *The British Want to Come to America—with Wiretap Orders and Search Warrants*, WASH. POST (Feb. 4, 2016), at [https://www.washingtonpost.com/world/national-security/the-british-want-to-come-to-america-with-wiretap-orders-and-search-warrants/2016/02/04/b351ce9e-ca86-11e5-a7b2-5a2f824b02c9\\_story.html?noredirect=on&utm\\_term=.4649759d38ea](https://www.washingtonpost.com/world/national-security/the-british-want-to-come-to-america-with-wiretap-orders-and-search-warrants/2016/02/04/b351ce9e-ca86-11e5-a7b2-5a2f824b02c9_story.html?noredirect=on&utm_term=.4649759d38ea); see also Andrew Keane Woods, *The US-UK Data Deal*, LAWFARE (Feb. 10, 2016), at <https://lawfareblog.com/us-uk-data-deal> (arguing that “an agreement, with the right safeguards, can be seen as critical for the preserving [of] the internet as we know it, and over the long term a significant victory for privacy”).

<sup>45</sup> Downing Testimony, *supra* note 3, at 13–14; see also Kadzik Letter, *supra* note 10, at 1 (“The legislative proposal is necessary to implement a potential bilateral agreement between the United Kingdom and United States.”).

“[e]xpediently implementing similar agreements with the European Union and other allies. . . .”<sup>46</sup> British officials also voiced strong support for the CLOUD Act, with Prime Minister Theresa May stressing the “great importance of the legislation” to President Trump,<sup>47</sup> and U.K. Deputy National Security Advisor Paddy McGuinness testifying in support of the legislation in committee hearings in both the House of Representatives and the Senate.<sup>48</sup>

Despite this public support and the Act’s passage, a draft of the U.S.–U.K. agreement had not been released as of May 31, 2018, and the attorney general had not submitted the necessary written certification to Congress.

*Trump Administration Expels Russian Diplomats and Imposes Russia-Related Sanctions*  
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During the spring of 2018, the Trump administration expelled sixty Russian intelligence officers and diplomats and also imposed sanctions against various Russian individuals and companies.<sup>1</sup> These actions responded to a range of actions attributed to Russia, including a poisoning on U.K. soil, its efforts to destabilize Ukraine, its support of the Assad regime in Syria, and various cyber activities.

On March 4, 2018, a military-grade nerve agent was used against a former Russian double agent, now a British citizen, and his daughter in the U.K. city of Salisbury.<sup>2</sup> British Prime Minister Theresa May attributed this act to Russia, calling it an “unlawful use of

<sup>46</sup> Office of Sen. Orrin Hatch Press Release, Hatch Previews CLOUD Act: Legislation to Solve the Problem of Cross-Border Data Requests (Feb. 5, 2018), at <https://www.hatch.senate.gov/public/index.cfm/2018/2/hatch-previews-cloud-act-legislation-to-solve-the-problem-of-cross-border-data-requests> [<https://perma.cc/CEK2-PKBN>].

<sup>47</sup> British Prime Minister’s Off. Press Release, PM Call with President Trump: 6 February 2018 (Feb. 6, 2018), at <https://www.gov.uk/government/news/pm-call-with-president-trump-6-february-2018> [<https://perma.cc/R83W-HUFR>].

<sup>48</sup> See *Data Stored Abroad: Ensuring Lawful Access and Privacy Protection in the Digital Era: Hearing Before the H. Comm. on the Judiciary*, 115th Cong. 15 (June 15, 2017) (statement of Paddy McGuinness, U.K. Deputy National Security Advisor); *Law Enforcement Access to Data Stored Across Borders: Facilitating Cooperation and Protecting Rights Before S. Comm. on the Judiciary*, 115th Cong. (May 24, 2017, rescheduled from May 10, 2017) (statement of Paddy McGuinness, U.K. Deputy National Security Advisor).

<sup>1</sup> U.S. Dep’t of State Press Release, Holding Russia Accountable for Its Destabilizing Behavior (Mar. 26, 2018), at <https://www.state.gov/r/pa/prs/ps/2018/03/279552.htm> [<https://perma.cc/2LQF-ZY6R>] [hereinafter Mar. 26 State Press Release]; U.S. Dep’t of Treasury Press Release, Treasury Designates Russian Oligarchs, Officials, and Entities in Response to Worldwide Malign Activity (Apr. 6, 2018), at <https://home.treasury.gov/news/featured-stories/treasury-designates-russian-oligarchs-officials-and-entities-in-response-to> [<https://perma.cc/42Q7-ZG2B>] [hereinafter Apr. 6 Treasury Press Release]. For an account of prior responses by the administration to Russian behavior, including other sanctions imposed earlier in the spring, see Jean Galbraith, *Contemporary Practice of the United States*, 113 AJIL 296 (2018).

<sup>2</sup> Guy Faulconbridge & Michael Holden, *Explainer: The Poisoning of Former Russian Double Agent Sergei Skripal*, REUTERS (Mar. 13, 2018), at <https://www.reuters.com/article/us-britain-russia-explainer/explainer-the-poisoning-of-former-russian-double-agent-sergei-skripal-idUSKCN1GP2CH>.

force by the Russian state against the United Kingdom.”<sup>3</sup> The United States joined Britain, France, and various other countries in condemning Russia’s actions.<sup>4</sup> On March 26, 2018, the Trump administration ordered the expulsion of twelve Russian intelligence officers and forty-eight other Russian officials, as well as the closure of the Russian consulate in Seattle.<sup>5</sup> The White House press secretary Sarah Huckabee Sanders stated, “The United States takes this action in conjunction with our NATO allies and partners around the world in response to Russia’s use of a military-grade chemical weapon on the soil of the United Kingdom, the latest in its ongoing pattern of destabilizing activities around the world.”<sup>6</sup>

In response, Russia denied responsibility for the use of the nerve agent, expelled sixty American diplomats and a number of diplomats from other countries, and ordered the closure of the U.S. consulate in St. Petersburg.<sup>7</sup> Sanders denounced this response:

Russia’s action today to expel American diplomats marks a further deterioration in the United States-Russia relationship. The expulsion of undeclared Russian intelligence officers by the United States and more than two dozen partner nations and NATO allies earlier this week was an appropriate response to the Russian attack on the soil of the United Kingdom. Russia’s response was not unanticipated, and the United States will deal with it.<sup>8</sup>

Separately, on April 6, 2018, the U.S. Department of the Treasury imposed sanctions on seven Russian oligarchs and several of the companies they own or control, seventeen Russian government officials, and a Russian weapons trading company and its subsidiary.<sup>9</sup> These sanctions were implemented pursuant to Executive Orders 13661 and 13662, “Blocking Property of Additional Persons Contributing to the Situation in Ukraine,” orders codified and amended by §§ 222 and 223 of the Countering America’s Adversaries

<sup>3</sup> Prime Minister Theresa May, Statement to the House of Commons Following the Salisbury Incident (Mar. 14, 2018), at <https://www.gov.uk/government/speeches/pm-commons-statement-on-salisbury-incident-response-14-march-2018>; see also Ashley Deeks, *Prime Minister May’s Use-of-Force Claim: Clarifying the Law That Governs the U.K.’s Options*, LAWFARE (Mar. 13, 2018), <https://lawfareblog.com/prime-minister-mays-use-of-force-claim-clarifying-law-governs-uks-options> (discussing the international legal implications of this determination).

<sup>4</sup> Katie Rogers & Eileen Sullivan, *Trump and Western Allies Expel Scores of Russians in Sweeping Rebuke Over U.K. Poisoning*, N.Y. TIMES (Mar. 26, 2018), at <https://www.nytimes.com/2018/03/26/world/europe/trump-russia-diplomats-expulsion.html>.

<sup>5</sup> Mar. 26 State Press Release, *supra* note 1.

<sup>6</sup> White House Press Release, Statement from the Press Secretary on the Expulsion of Russian Intelligence Officers (Mar. 26, 2018), at <https://www.whitehouse.gov/briefings-statements/statement-press-secretary-expulsion-russian-intelligence-officers> [<https://perma.cc/8VPQ-5YHU>].

<sup>7</sup> UN Security Council Press Release, Full Investigation Must Swiftly Identify, Apprehend Perpetrators, Security Council Hears During Heated Discussion on Salisbury Chemical Attack, UN Press Release SC/13279 (Apr. 5, 2018), at <https://www.un.org/press/en/2018/sc13279.doc.htm> [<https://perma.cc/5ZZ8-6NPF>]; Andrew Higgins, *Expelling Diplomats, a Furious Kremlin Escalates a Crisis*, N.Y. TIMES (Mar. 29, 2018), at <https://www.nytimes.com/2018/03/29/world/europe/russia-expels-diplomats.html>.

<sup>8</sup> White House Press Release, Statement from the Press Secretary Regarding Russia’s Expulsion of American Diplomats (Mar. 29, 2018), at <https://www.whitehouse.gov/briefings-statements/statement-press-secretary-regarding-russias-expulsion-american-diplomats> [<https://perma.cc/Z5LK-NGAF>].

<sup>9</sup> Apr. 6 Treasury Press Release, *supra* note 1. The Department of the Treasury’s press release did not specifically reference the Salisbury poisoning in announcing the sanctions. See *id.*

Through Sanctions Act (CAATSA).<sup>10</sup> The sanctions freeze any assets under U.S. jurisdiction of the designated individuals and entities and prohibit U.S. individuals and entities from dealing with them.<sup>11</sup> Some of these individuals had been previously included on a list of oligarchs issued in January by the Department of Treasury pursuant to an obligation imposed by CAATSA.<sup>12</sup>

In announcing the sanctions, Secretary of the Treasury Steven Mnuchin explained:

“The Russian government operates for the disproportionate benefit of oligarchs and government elites. . . . The Russian government engages in a range of malign activity around the globe, including continuing to occupy Crimea and instigate violence in eastern Ukraine, supplying the Assad regime with material and weaponry as they bomb their own civilians, attempting to subvert Western democracies, and malicious cyber activities. Russian oligarchs and elites who profit from this corrupt system will no longer be insulated from the consequences of their government’s destabilizing activities.”<sup>13</sup>

The expulsion and sanctions have been accompanied by some mixed messages from the Trump administration regarding its approach to Russia. In March, President Trump congratulated President Putin on his reelection,<sup>14</sup> prompting Senator John McCain to respond that “[a]n American president does not lead the Free World by congratulating dictators on winning sham elections.”<sup>15</sup> In April, U.S. Ambassador to the United Nations Nikki Haley announced that additional sanctions would be imposed against Russian companies that helped facilitate Syria’s use of chemical weapons.<sup>16</sup> Although the Trump administration had condemned Russia’s role in relation to Syria’s use of chemical weapons,<sup>17</sup> it backed away from Haley’s announcement.<sup>18</sup> More generally, shadowing the Trump administration’s relationship with Russia are concerns about Russian interference in the 2016 presidential

<sup>10</sup> *Id.* (also referencing Executive Order 13582 as an authority); see also Countering America’s Adversaries Through Sanctions Act, Pub. L. No. 115-44, §§ 222, 223, 131 Stat. 886, 906-08 (2017).

<sup>11</sup> Apr. 6 Treasury Press Release, *supra* note 1 (further providing a wind-down period).

<sup>12</sup> *Id.*; see also Galbraith, *supra* note 1, at 301–03 (describing this list and the CAATSA provision giving rise to it).

<sup>13</sup> Apr. 6 Treasury Press Release, *supra* note 1.

<sup>14</sup> White House Press Release, Readout of President Donald J. Trump’s Call With President Vladimir Putin of Russia (Mar. 20, 2018), at <https://www.whitehouse.gov/briefings-statements/readout-president-donald-j-trumps-call-president-vladimir-putin-russia-3> [<https://perma.cc/SDV3-PSYA>].

<sup>15</sup> Office of Senator John McCain Press Release, Statement by SASC Chairman John McCain on President Trump Congratulating Vladimir Putin (Mar. 20, 2018), at <https://www.mccain.senate.gov/public/index.cfm/press-releases?ID=61F7FD60-671F-4364-8297-1AB43F099405>.

<sup>16</sup> *Transcript: U.N. Ambassador Nikki Haley on “Face the Nation,” April 15, 2018*, CBS NEWS (Apr. 15, 2018), at <https://www.cbsnews.com/news/transcript-u-n-ambassador-nikki-haley-on-face-the-nation-april-15-2018>.

<sup>17</sup> White House Press Release, United States Government Assessment of the Assad Regime’s Chemical Weapons Use (Apr. 13, 2018), at <https://www.whitehouse.gov/briefings-statements/united-states-government-assessment-assad-regimes-chemical-weapons-use> [<https://perma.cc/553G-RJDC>]. Trump, in subsequent tweets, declared Putin and Russia responsible and promised there would be a “[b]ig price” to pay. See Donald J. Trump (@realDonaldTrump), TWITTER (Apr. 8, 2018, 6:00 AM), at <https://twitter.com/realDonaldTrump/status/982966315467116544>; Donald J. Trump (@realDonaldTrump), TWITTER (Apr. 8, 2018, 6:04 AM), at <https://twitter.com/realDonaldTrump/status/982967389028569088>.

<sup>18</sup> Peter Baker, Julie Davis & Maggie Haberman, *Sanctions Flap Erupts Into Open Conflict Between Haley and White House*, N.Y. TIMES (Apr. 17, 2018), at <https://www.nytimes.com/2018/04/17/world/europe/trump-nikki-haley-russia-sanctions.html> (describing a back-and-forth in which a White House official characterized Haley as experiencing “momentary confusion” with respect to her announcement of additional sanctions and Haley responded that “I don’t get confused”).

election, in addition to ongoing investigations and litigation regarding any connections between the Trump campaign and Russia.<sup>19</sup>

#### STATE JURISDICTION AND IMMUNITY

*U.S. Supreme Court Holds that a Provision of the Foreign Sovereign Immunities Act Does Not Lift Immunity from Attachment of Iranian Artifacts*

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The U.S. Supreme Court recently held unanimously that § 1610(g) of the Foreign Sovereign Immunities Act (FSIA) does not lift the immunity from attachment of certain artifacts belonging to Iran.<sup>1</sup> The case, *Rubin v. Islamic Republic of Iran*, stemmed from the petitioners' attempt to satisfy a prior judgment against Iran for injuries sustained in Hamas suicide bombings in Jerusalem in 1997.<sup>2</sup>

Subject to exceptions, the FSIA “grants foreign states and their agencies and instrumentalities immunity from suit in the United States (called jurisdictional immunity) and grants their property immunity from attachment and execution in satisfaction of judgments against them.”<sup>3</sup> In *Rubin*, the petitioners sought to attach Iranian property in order to satisfy a judgment they had previously received under § 1605A of the FSIA, which provides an exception to jurisdictional immunity for acts of terrorism attributable in specified ways to state sponsors of terrorism. Specifically, the petitioners sought to seize Iranian artifacts known as the Persepolis Collection in the University of Chicago's possession.<sup>4</sup> The collection, which consists of approximately 30,000 ancient clay tablets and fragments with writings, was loaned to the University of Chicago by Iran in 1937.<sup>5</sup>

<sup>19</sup> U.S. Special Counsel Robert S. Mueller was appointed in May 2017 to investigate possible Russian interference and links to the Trump campaign. Rod J. Rosenstein, Acting Attorney General, Order. No. 3915-2017 re Appointment of Special Counsel to Investigate Russian Interference with the 2016 Presidential Election and Related Matters (May 17, 2017), available at <https://www.justice.gov/opa/press-release/file/967231/download> [<https://perma.cc/6M9E-T4ZV>]. On February 16, 2018, thirteen Russian nationals and three companies were indicted. Indictment, United States v. Internet Research Agency LLC, No. 1:18-cr-00032-DLF, 2018 WL 914777 (D.D.C. filed Feb. 16, 2018), available at <https://assets.documentcloud.org/documents/4380504/The-Special-Counsel-s-Indictment-of-the-Internet.pdf> [<https://perma.cc/V6J6-GH7M>]. On April 20, 2018, the Democratic National Committee (DNC) filed a lawsuit against, among other persons and entities, the Russian government and the Trump campaign, alleging, among other things, that the campaign conspired with Russia in relation to hacked DNC emails. Complaint, Democratic Nat'l Comm. v. Russ. Fed'n, No. 1-18-cv-03501, 2018 WL 1885868 (S.D.N.Y. filed Apr. 20, 2018).

<sup>1</sup> *Rubin v. Islamic Republic of Iran*, 538 U.S. \_\_\_, 138 S. Ct. 816, 827 (2018). Justice Kagan did not participate in the decision. *Id.* at 827.

<sup>2</sup> *Id.* at 820–21. In 2003, a federal district court granted a default judgment against Iran under the prior state-sponsored terrorism exception to the FSIA's establishment of jurisdictional immunity. *Campuzano v. Islamic Republic of Iran*, 281 F. Supp. 2d 258, 260, 269–70 (D.D.C. 2003). The court subsequently granted the petitioners' motion to convert the judgment to one under 28 U.S.C. § 1605A, a more expansive exception to immunity for state-sponsored terrorism passed by Congress in 2008. 563 F. Supp. 2d 38, 39 n.3 (D.D.C. 2008). As part of their lengthy attempt to satisfy the judgment, petitioners sought to attach the artifacts at issue in this case. See *Rubin v. Islamic Republic of Islam*, 830 F.3d 470, 474–75 (7th Cir. 2016) (describing the procedural history).

<sup>3</sup> *Rubin*, 138 S. Ct. at 820–21 (citing 28 U.S.C. §§ 1604, 1609).

<sup>4</sup> *Id.* at 819–21.

<sup>5</sup> *Id.* at 821.

Section 1610 delineates exceptions to the FSIA’s default of immunity from attachment or execution for state property. Sections 1610(a), (b), and (d) permit attachment of property used for commercial activity under certain conditions.<sup>6</sup> For example, § 1610(a) provides that the “property in the United States of a foreign state . . . used for a commercial activity in the United States, shall not be immune from attachment . . . if . . . (7) the judgment relates to a claim for which the foreign state is not immune under section 1605A. . . .”<sup>7</sup> Earlier in the litigation, petitioners had unsuccessfully argued that the Persepolis Collection was used for commercial activity for purposes of § 1610(a)(7).<sup>8</sup> By the time the Supreme Court heard the case on the merits, however, petitioners were limited to seeking the Persepolis Collection under a different sub-section—§ 1610(g)—which they argued provided a freestanding exception to immunity for the property of a state against whom a judgment has been entered under § 1605A.

Added to the FSIA in 2008, § 1610(g) provides:

(g) Property in certain actions.

- (1) In general. . . . [T]he property of a foreign state against which a judgment is entered under section 1605A, and the property of an agency or instrumentality of such a state, including property that is a separate juridical entity or is an interest held directly or indirectly in a separate juridical entity, is subject to attachment in aid of execution, and execution, upon that judgment as provided in this section, regardless of—
  - (A) the level of economic control over the property by the government of the foreign state;
  - (B) whether the profits of the property go to that government;
  - (C) the degree to which officials of that government manage the property or otherwise control its daily affairs;
  - (D) whether that government is the sole beneficiary in interest of the property; or
  - (E) whether establishing the property as a separate entity would entitle the foreign state to benefits in United States courts while avoiding its obligations.<sup>9</sup>

In an opinion by Justice Sotomayor issued in February 2018, the Supreme Court held unanimously that § 1610(g) did not create an independent exception to the immunity of state property for parties seeking to satisfy a § 1605A judgment. Instead, “[a] judgment holder seeking to take advantage of § 1610(g)(1) must identify a basis under one of § 1610’s express immunity-abrogating provisions to attach and execute against a relevant property.”<sup>10</sup>

<sup>6</sup> 28 U.S.C. § 1610.

<sup>7</sup> 28 U.S.C. § 1610(a).

<sup>8</sup> *Rubin*, 830 F.3d at 479 (rejecting arguments that “a third party’s commercial use of the property triggers § 1610(a)” and also expressing skepticism that “the University’s academic study of the Persepolis Collection counts as a commercial use”); *see also* 137 S. Ct. 2326 (2017) (granting certiorari only with respect to the interpretation of § 1610(g)).

<sup>9</sup> 28 U.S.C. § 1610(g)(1).

<sup>10</sup> *Rubin*, 138 S. Ct. at 824.

In reaching this holding, the Court observed that § 1610(g)(1) was added to the FSIA in 2008 to abrogate in part the Court's earlier decision in *First National City Bank v. Banco Para el Comercio Exterior de Cuba (Bancec)*.<sup>11</sup> *Bancec* had established a presumption that, under the FSIA, a foreign state's agencies and instrumentalities with separate juridical status could not be deemed liable for the state's acts.<sup>12</sup> The federal appellate courts then developed a five-factor test to determine when this presumption would be overcome.<sup>13</sup> In *Rubin*, the Supreme Court reasoned that, in § 1610(g)(1), Congress had clearly rejected *Bancec* and its subsequent refinement as to the satisfaction of judgments entered for state sponsorship of terrorism under § 1605A.<sup>14</sup> This is evident, noted the Court, because § 1610(g)(1) provides that state agencies and instrumentalities are liable "regardless of" five listed factors which, the Court noted, resemble "almost verbatim" the prior five-factor test.<sup>15</sup>

The Court then asked whether, in addition to abrogating *Bancec*, "§ 1610(g) does something more . . . [and] provides an independent exception to immunity so that it allows a § 1605A judgment holder to attach and execute against *any* property of the foreign state."<sup>16</sup> Based on statutory text and historical practice, the Court concluded that the answer was no:

Section 1610(g)(1) provides that certain property will be "subject to attachment in aid of execution . . . as provided in this section." (Emphasis added.) The most natural reading is that "this section" refers to § 1610 as a whole, so that § 1610(g)(1) will govern the attachment and execution of property that is exempted from the grant of immunity as provided elsewhere in § 1610.

...

[Unlike § 1610 (a)(7) and other sub-sections of § 1610, § 1610(g)] conspicuously lacks the textual markers "shall not be immune" or "notwithstanding any other provision of law" that would have shown that it serves as an independent avenue for abrogation of immunity.

...

If the Court were to conclude that § 1610(g) establishes a basis for the withdrawal of property immunity any time a plaintiff holds a judgment under § 1605A, each of [various other § 1610 sub-sections] would be rendered superfluous because a judgment holder could always turn to § 1610(g), regardless of whether the conditions of any other provisions were met.

The Court's interpretation of § 1610(g) is also consistent with the historical practice of rescinding attachment and execution immunity primarily in the context of a foreign state's commercial acts.<sup>17</sup>

<sup>11</sup> *Id.* at 823.

<sup>12</sup> *First Nat. City Bank v. Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611, 628 (1983).

<sup>13</sup> *Rubin*, 138 S. Ct. at 823.

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

<sup>15</sup> 28 U.S.C. § 1610(g)(1); *Rubin*, 138 S. Ct. at 823.

<sup>16</sup> *Rubin*, 138 S. Ct. at 823.

<sup>17</sup> *Id.* at 823–25.

The Court thus held that parties who seek to satisfy a judgment under § 1605A's state-sponsored terrorism exception to jurisdictional immunity cannot rely on § 1610(g), but must instead satisfy one of § 1610's other immunity-abrogating provisions. In an amicus brief filed in support of Iran, the United States emphasized that this reading of § 1610(g) was consistent with broader U.S. policy interests. The U.S. brief explained:

Even in the context of actions against state sponsors of terrorism, execution could provoke serious foreign policy consequences, including impacts on the treatment of the United States' own property abroad. . . .

The property at issue here consists of ancient Persian artifacts, documenting a unique aspect of Iran's cultural heritage, that were lent to a U.S. institution in the 1930s for academic study. Iran has never used the Collection for commercial activity in the United States . . . . Execution against such unique cultural artifacts could cause affront and reciprocity problems that are different in kind from execution under any other provision of Section 1610.<sup>18</sup>

Although the Court did not discuss these policy interests, it emphasized the "delicate balance that Congress struck in enacting the FSIA."<sup>19</sup>

#### INTERNATIONAL ECONOMIC LAW

*U.S. Tariffs on Steel and Aluminum Imports Go into Effect, Leading to Trade Disputes*  
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Consistent with President Trump's America First trade agenda, his administration imposed tariffs on steel and aluminum imports in early March of 2018, triggering various responses and challenges. Countries have followed through on early objections to the tariffs through retaliatory tariffs and challenges in the World Trade Organization (WTO), and steel importers have challenged the legality of these tariffs under U.S. domestic law. At the same time, these tariffs have been revised multiple times, either to delay the implementation period for certain countries seeking exemptions or to permanently grant exemptions to countries who reached negotiated arrangements with the United States.

On March 8, 2018, the United States imposed a ten percent tariff on imported aluminum,<sup>1</sup> and a twenty-five percent tariff on imported steel.<sup>2</sup> These tariffs were imposed pursuant to Section 232 of the Trade Expansion Act of 1962,<sup>3</sup> which allows the president to adjust imports once "the [Secretary of Commerce] finds that an article is being imported into the United States in such quantities or under such circumstances as to threaten to impair the

<sup>18</sup> Brief for the United States as Amicus Curiae Supporting Respondents, *Rubin v. Islamic Republic of Iran* at 31–32, 538 U.S. \_\_\_, 138 S. Ct. 816 (2018) (No. 16-534).

<sup>19</sup> *Rubin*, 138 S. Ct. at 825.

<sup>1</sup> Proclamation No. 9704, 83 Fed. Reg. 11,619 (Mar. 8, 2018) [hereinafter Aluminum Tariff].

<sup>2</sup> Proclamation No. 9705, 83 Fed. Reg. 11,625 (Mar. 8, 2018) [hereinafter Steel Tariff].

<sup>3</sup> 19 U.S.C. § 1862 (2012).

national security.”<sup>4</sup> As originally enacted, the tariffs were to go into effect March 23, 2018,<sup>5</sup> with built-in temporary exemptions for imports from Canada and Mexico.<sup>6</sup>

In addition to initial exemptions for Canada and Mexico, Trump recognized that “[the United States] has important security relationships with some countries whose exports of steel articles to the United States weaken our internal economy and thereby threaten to impair the national security,” and explicitly encouraged any such country to engage in negotiations to find alternatives to the tariffs.<sup>7</sup> Following the announcement of the tariffs, various U.S. trading partners sought to take advantage of this option.<sup>8</sup>

On March 22, 2018, the day before the tariffs were originally to go into effect, Trump signed Proclamation 9710<sup>9</sup> and Proclamation 9711,<sup>10</sup> which amended Proclamations 9704 and 9705. Proclamations 9710 and 9711 granted extensions until May 1, 2018 to Argentina, Australia, Brazil, South Korea, and the European Union (EU),<sup>11</sup> in addition to the preexisting extensions for Canada and Mexico. These extensions were granted in light of “important security relationships”<sup>12</sup> and also make reference to shared policy interests unique to these specific states.<sup>13</sup> For all other countries, the tariffs went into effect on the original date of March 23.<sup>14</sup> China promptly responded by imposing tariffs on 128 U.S. products worth approximately \$3 billion in exports, describing the U.S. tariffs as “safeguard measures . . . only targeted at a few countries [and that] violated the non-discrimination principle, which is the footstone of [the] multilateral trading system.”<sup>15</sup>

<sup>4</sup> *Id.* at § 1862(c)(1)(A). For discussion of the Section 232 determination and of the tariffs as originally enacted, see Jean Galbraith, *Contemporary Practice of the United States*, 112 *AJIL* 315, 316–18 (2018).

<sup>5</sup> Aluminum Tariff, *supra* note 1, at 11,621; Steel Tariff, *supra* note 2, at 11,627.

<sup>6</sup> Aluminum Tariff, *supra* note 1, at 11,620; Steel Tariff, *supra* note 2, at 11,626.

<sup>7</sup> Aluminum Tariff, *supra* note 1, at 11,620; Steel Tariff, *supra* note 2, at 11,626.

<sup>8</sup> See, e.g., White House Press Release, *Readout of President Donald J. Trump’s Call with President Mauricio Macri of Argentina* (Mar. 9, 2018), at <https://www.whitehouse.gov/briefings-statements/readout-president-donald-j-trumps-call-president-mauricio-macri-argentina> [<https://perma.cc/VWV5-YYRB>] (“[T]he two leaders discussed potential United States tariffs on foreign steel and aluminum.”); White House Press Release, *Readout of President Donald J. Trump’s Call with President Emmanuel Macron of France* (Mar. 21, 2018), at <https://www.whitehouse.gov/briefings-statements/readout-president-donald-j-trumps-call-president-emmanuel-macron-france-10> [<https://perma.cc/HR24-DYMJ>] (“The two leaders discussed how the United States and Europe might come together over tariffs.”); Dep’t of Commerce Press Release, *Joint Statement of U.S. Secretary of Commerce Wilbur Ross and European Commissioner for Trade Cecilia Malmström* (Mar. 21, 2018), at <https://www.commerce.gov/news/press-releases/2018/03/joint-statement-us-secretary-commerce-wilbur-ross-and-european> [<https://perma.cc/EV8C-CUTE>] (“We have agreed to launch immediately a process of discussion with President Trump and the Trump Administration on trade issues of common concern, including steel and aluminum, with a view to identifying mutually acceptable outcomes as rapidly as possible.”).

<sup>9</sup> Proclamation No. 9710, 83 *Fed. Reg.* 13,355 (Mar. 22, 2018) [hereinafter *March 22 Aluminum Extension*].

<sup>10</sup> Proclamation No. 9711, 83 *Fed. Reg.* 13,361 (Mar. 22, 2018) [hereinafter *March 22 Steel Extension*].

<sup>11</sup> *March 22 Aluminum Extension*, *supra* note 9, at 13,355; *March 22 Steel Extension*, *supra* note 10, at 13,361.

<sup>12</sup> *March 22 Aluminum Extension*, *supra* note 9, at 13,355; *March 22 Steel Extension*, *supra* note 10, at 13,361.

<sup>13</sup> E.g., *March 22 Aluminum Extension*, *supra* note 9, at 13,356 (noting specifically for South Korea that the important security relationship includes “our shared commitment to eliminating the North Korean nuclear threat; our decades old military alliance; our shared commitment to addressing global excess capacity in aluminum production; and our strong economic and strategic partnership”).

<sup>14</sup> *March 22 Aluminum Extension*, *supra* note 9, at 13,357; *March 22 Steel Extension*, *supra* note 10, at 13,363.

<sup>15</sup> People’s Republic of China Ministry of Commerce Press Release, *Spokesman of Ministry of Commerce Comments on China’s Decision to Slap Tariffs on Part of Products Imported from US* (Apr. 3, 2018), at

Just before the end of March, South Korea and the United States “agreed on terms for a country exemption for the Republic of Korea from tariffs imposed on steel imports . . . pursuant to Presidential Proclamation 9705, as amended.”<sup>16</sup> According to a press release from South Korea’s Ministry of Trade, Industry and Energy:

Regarding the steel tariff issue, Trade Minister Kim said that the U.S. agreed to exempt Korea from steel tariffs imposed under Section 232 of the U.S. Trade Expansion Act and that Korea agreed to receive a quota of about 2.68 million tons of steel exports annually. This is equivalent to about 70 percent of the annual average Korean steel exports to the U.S. between 2015 and 2017.<sup>17</sup>

The EU and the other countries that had received extensions continued to negotiate for more permanent solutions. On April 30, 2018, again the day before the tariffs were to go into effect, Trump signed Proclamation 9739<sup>18</sup> and Proclamation 9740,<sup>19</sup> once again amending Proclamations 9704 and 9705. Proclamations 9739 and 9740 split the remaining extension receivers, Australia, Argentina, Brazil, Canada, Mexico, and the EU, into two distinct groups.

With regard to the first group, comprised of Australia, Argentina, and Brazil, President Trump found that, while the specific details of deals still had to be worked out, these countries had “agreed in principle . . . on satisfactory alternate means to address the threatened impairment to our national security.”<sup>20</sup> The text did not make clear what these “satisfactory alternate means” were, but a corresponding White House press release indicated that the United States was focusing on quotas.<sup>21</sup> News reports in the following month

<http://english.mofcom.gov.cn/article/newsrelease/policyreleasing/201804/20180402733539.shtml> [<https://perma.cc/S7GK-QDGG>] (further claiming a “legitimate right to suspend part of its obligations to the US as a WTO member”); *see also* People’s Republic of China Ministry of Commerce Press Release, The Spokesperson of the Ministry of Commerce Makes Remarks on China’s Release of a List of Discontinuation Concessions Against the U.S. Steel and Aluminum Imports Under Section 232 (Mar. 24, 2018), *at* <http://english.mofcom.gov.cn/article/newsrelease/policyreleasing/201803/20180302723376.shtml> [<https://perma.cc/EWE4-AYB7>] (giving notice of this intended action).

<sup>16</sup> Off. of the U.S. Trade Rep. Press Release, Joint Statement by the United States Trade Representative Robert E. Lighthizer and Republic of Korea Minister for Trade Hyun Chong Kim (Mar. 28, 2018), *at* <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2018/march/joint-statement-united-states-trade> [<https://perma.cc/QF8J-AYZ6>].

<sup>17</sup> Republic of Korea Ministry of Trade, Industry and Energy Press Release, Korea, US Reach Agreement on Trade Deal and Steel Tariff Exemption (Mar. 26, 2018), *at* [http://english.motie.go.kr/en/pc/photonews/bbs/bbsList.do?bbs\\_cd\\_n=1&bbs\\_seq\\_n=678](http://english.motie.go.kr/en/pc/photonews/bbs/bbsList.do?bbs_cd_n=1&bbs_seq_n=678) [<https://perma.cc/AUS2-L6L8>]. This agreement was negotiated simultaneously with a successful renegotiation of the United States–Republic of Korea Free Trade Agreement (KORUS). *Id.* While these resolutions have reduced trade tensions between the United States and South Korea, some issues remain, as two requests for consultations brought in the WTO in May 2018 by South Korea demonstrate. *See* WTO Press Release, Korea Initiates WTO Dispute Complaints against US Safeguard Duties on Washers, Solar Cells (May 16, 2018), *at* [https://www.wto.org/english/news\\_e/news18\\_e/ds545\\_546rfc\\_16may18\\_e.htm](https://www.wto.org/english/news_e/news18_e/ds545_546rfc_16may18_e.htm).

<sup>18</sup> Proclamation No. 9739, 83 Fed. Reg. 20,677 (Apr. 30, 2018) [hereinafter April 30 Aluminum Extension].

<sup>19</sup> Proclamation No. 9740, 83 Fed. Reg. 20,683 (Apr. 30, 2018) [hereinafter April 30 Steel Extension].

<sup>20</sup> April 30 Aluminum Extension, *supra* note 18, at 20,677; April 30 Steel Extension, *supra* note 19, at 20,684. Proclamation 9740 additionally implemented the tariff waiver struck with South Korea, exempting South Korea from the steel tariff but noting that “[t]he United States will monitor the implementation and effectiveness of the [steel] quota and other measures agreed upon with South Korea in addressing our national security needs, and [Trump] may revisit this [exemption], as appropriate.” April 30 Steel Extension, *supra* note 19, at 20,684.

<sup>21</sup> White House Press Release, President Donald J. Trump Approves Section 232 Tariff Modifications (Apr. 30, 2018), *at* <https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-approves-section-232->

supported this as to Argentina and, with respect to steel, as to Brazil.<sup>22</sup> (Australian officials, by contrast, rejected reports that Australia had agreed to quotas, stating that they received a “permanent and unconditional” exemption.<sup>23</sup>) These three countries thus received tariff exemptions without expiration dates, although the proclamations include a provision that “if the satisfactory alternative means are not finalized shortly, [Trump] will consider reimposing the tariff.”<sup>24</sup> On May 31, President Trump issued two more proclamations relevant to these countries, with Proclamation 9759 granting permanent exemptions to all three countries with respect to steel<sup>25</sup> and Proclamation 9758 granting permanent exemptions to Argentina and Australia with respect to aluminum.<sup>26</sup> These exemptions were given because the “United States has agreed on a range of measures with these countries, including measures to reduce excess [steel/aluminum] production and excess [steel/aluminum] capacity . . . .”<sup>27</sup>

The remaining countries, Canada, Mexico, and the EU, had not come to any agreement with the United States at the time of the April 30 proclamations. But in light of an asserted need for continuing and productive discussions, Trump elected to reextend the non-enforcement period for all three until June 1, 2018. By the time this date arrived, no deals had been reached with any of the three, and the tariffs accordingly went into effect.<sup>28</sup> For Canada and Mexico, the negotiations were wrapped up in the ongoing negotiations over the North American Free Trade Agreement (NAFTA).<sup>29</sup> For its part, the EU was firm in its insistence that it “will not negotiate under threat” and that it should be “fully and permanently

tariff-modifications [<https://perma.cc/HW65-B7RP>] (“In all of these negotiations, the Administration is focused on quotas that will restrain imports, prevent transshipment, and protect the national security.”).

<sup>22</sup> *Government Celebrates Exemption from US Steel and Aluminum Tariffs*, BUENOS AIRES TIMES (May 5, 2018), at <http://www.batimes.com.ar/news/economy/government-celebrates-exemption-from-us-steel-and-aluminium-tariffs.phtml> (noting Argentina’s acceptance of a 180,000 ton quota for both steel and aluminum); Bruno Federowski & Alberto Alerigi, *U.S. Cuts off Brazil Tariff Talks, Adopts Steep Import Quotas*, REUTERS (May 2, 2018), at <https://www.reuters.com/article/us-usa-trade-brazil/us-cuts-off-brazil-tariff-talks-adopts-steel-import-quotas-idUSKBN1I31ZD> (stating that Brazil had arranged for a 3.5 million ton quota for steel but had accepted the 10% tariff on aluminum).

<sup>23</sup> Paul Karp, *Australia Rejects Fears Trump Steel Tariff Exemption Subject to Quotas*, GUARDIAN (May 1, 2018), at <https://www.theguardian.com/australia-news/2018/may/02/australia-rejects-fears-trump-steel-tariff-exemption-subject-to-quotas>.

<sup>24</sup> April 30 Aluminum Extension, *supra* note 18, at 20,678; April 30 Steel Extension, *supra* note 19, at 20,684.

<sup>25</sup> Proclamation No. 9759, 83 Fed. Reg. 25,857 (May 31, 2018) [hereinafter May 31 Steel Proclamation].

<sup>26</sup> Proclamation No. 9758, 83 Fed. Reg. 25,849 (May 31, 2018) [hereinafter May 31 Aluminum Proclamation].

<sup>27</sup> May 31 Steel Proclamation, *supra* note 25, at 25,857; May 31 Aluminum Proclamation, *supra* note 26, at 25,849. While the proclamations specified new quotas for Argentina and, with respect to steel, for Brazil, they did not identify any quotas for Australia. See May 31 Steel Proclamation, *supra* note 25, at 25,858–59; May 31 Aluminum Proclamation, *supra* note 26, at 25,851.

<sup>28</sup> See May 31 Steel Proclamation, *supra* note 25, at 25,858; May 31 Aluminum Proclamation, *supra* note 26, at 25,850 (both “maintain[ing] the current tariff level as it applies to other countries”); see also David J. Lynch, Josh Dawsey & Damian Paletta, *Trump Imposes Steel and Aluminum Tariffs on the E.U., Canada, and Mexico*, WASH. POST (May 31, 2018), at [https://www.washingtonpost.com/business/economy/trump-imposes-steel-and-aluminum-tariffs-on-the-european-union-canada-and-mexico/2018/05/31/891bb452-64d3-11e8-a69c-b944de66d9e7\\_story.html?utm\\_term=.9001549fb075](https://www.washingtonpost.com/business/economy/trump-imposes-steel-and-aluminum-tariffs-on-the-european-union-canada-and-mexico/2018/05/31/891bb452-64d3-11e8-a69c-b944de66d9e7_story.html?utm_term=.9001549fb075) (reporting on this issue).

<sup>29</sup> See David Lawder, *Canada Sees Progress on NAFTA Auto Rules; Steel Tariffs Loom*, REUTERS (Apr. 25, 2018), at <https://www.reuters.com/article/us-trade-nafta/canada-sees-progress-on-nafta-auto-rules-steel-tariffs-loom-idUSKBN1HW2R8> (reporting that Mexico’s negotiators are “unhappy about having to deal with the steel tariff threat in parallel with the NAFTA negotiations,” and that Canada remains opposed to the tariffs, feeling that they should have a “full and permanent exemption from any quotas or tariffs” (internal quotation marks omitted)).

exempted from these measures.”<sup>30</sup> As of June 1, the EU, Mexico, and Canada had all signaled their intent to retaliate: “[t]he EU said it would impose import taxes on politically sensitive items like bourbon from Senate Majority Leader Mitch McConnell’s home state . . . Mexico said it would levy tariffs on American farm products, while Canada zeroed in on the same metals that Trump had targeted.”<sup>31</sup>

Unsurprisingly, the U.S. tariffs have generated responses within the WTO framework. Already at odds with the United States over other trade issues,<sup>32</sup> China was the first to act. On April 5, 2018, China filed a request for consultations in the WTO concerning the steel and aluminum tariffs.<sup>33</sup> The request alleged multiple violations of the General Agreement on Tariffs and Trade (GATT) 1994 and its associated Agreement on Safeguards.<sup>34</sup> As to GATT 1994, China claimed that the United States had imposed excess duties and was imposing its tariffs selectively.<sup>35</sup> As to the Agreement on Safeguards, China asserted that the U.S. tariffs were “safeguard measures in substance.”<sup>36</sup> It considered that the United States neither had an adequate justification for seeking to protect its domestic steel and aluminum industries through safeguards nor had followed the appropriate procedures for implementing safeguard measures.<sup>37</sup>

The United States responded that its tariffs were not safeguards, but rather tariffs that it was entitled to impose in light of GATT Article XXI, a provision which allows members to act for the protection of “essential security interests.”<sup>38</sup> Accordingly, the United States claimed, its tariffs “are issues of national security not susceptible to review or capable of resolution by WTO dispute settlement,” although it agreed to enter into consultations “[w]ithout prejudice” to this position.<sup>39</sup> It added that “[b]ecause the tariffs imposed pursuant to Section 232 are not safeguard measures, the United States considers Article 8.2 of the *Agreement on Safeguards* does not justify China’s suspension of concessions or other obligations”—and thus, in the United States’ view, China had no right to respond by targeting U.S. exports.<sup>40</sup>

<sup>30</sup> European Commission Press Release, Commission Statement Following US Announcement of an Extension Until 1 June of the EU’s Exemption from US Tariffs on Steel and Aluminum Imports (May 1, 2018), at <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1839&title=Commission-statement-following-US-announcement-of-an-extension-until-1-June-of-the-EUs-exemption-from-US-tariffs-on-steel-and-aluminium-imports> [<https://perma.cc/JPB7-H76M>].

<sup>31</sup> Lynch, Dawsey & Paletta, *supra* note 28.

<sup>32</sup> See Jean Galbraith, *Contemporary Practice of the United States*, 112 AJIL 505 (2018).

<sup>33</sup> Request for Consultations by China, *United States—Certain Measures on Steel and Aluminum Products*, WTO Doc. G/L1222; G/SG/D50/1; WT/DS544/1 (Apr. 5, 2018) hereinafter China Section 232 Request for Consultations.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 2 (citing Article II:1(a) & (b) and Article I:1, respectively, and also raising a claim under Article X:3 “because the United States has failed to administer its laws . . . in a uniform, impartial, and reasonable manner”).

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> Communication from the United States, *United States—Certain Measures on Steel and Aluminum Products*, WTO Doc. WT/DS544/2 (Apr. 13, 2018).

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* Article 8.2 allows states to respond to safeguard measures by “the application of substantially equivalent concessions or other measures” if “no agreement is reached within 30 days in the consultations” and subject to a notice requirement. *Agreement on Safeguards*, Art. 1, April 15, 1994, 1869 UNTS 154, 157.

The EU, along with India, Russia, Thailand, and Hong Kong, have sought to join the China-initiated consultations.<sup>41</sup> India and the EU have also each submitted their own requests for consultations, as have several other countries including Mexico and Canada.<sup>42</sup>

In addition to proceedings at the international level, at least one case challenging the steel tariffs has been brought in the U.S. Court of International Trade.<sup>43</sup> The action, brought by a Swiss steel exporter and its U.S. affiliate, alleges that

[t]he imposition of that tariff on the Plaintiff's steel is unconstitutional inasmuch as the Administration's Steel Proclamation was issued purely for political and economic reasons, and therefore exceeded the scope of Congress's delegation of authority to the Executive Branch to impose tariffs to promote and protect national security.<sup>44</sup>

The complaint also alleged a failure to provide fair notice.<sup>45</sup>

Notwithstanding the political and legal responses to the steel and aluminum tariffs, in the future the Trump administration may pursue Section 232 tariffs on other products as well. On May 23, 2018, "following a conversation with President Donald J. Trump, U.S. Secretary of Commerce Wilbur Ross initiated an investigation under Section 232 . . . [regarding] whether imports of automobiles . . . and automotive parts into the United States threaten to impair . . . national security . . . ."<sup>46</sup>

<sup>41</sup> Request to Join Consultations—Communication from India, *United States—Certain Measures on Steel and Aluminum Products*, WTO Doc. WT/DS544/3 (Apr. 17, 2018); Request to Join Consultations—Communication from Thailand, *United States—Certain Measures on Steel and Aluminum Products*, WTO Doc. WT/DS544/5 (Apr. 18, 2018); Request to Join Consultations—Communication from the Russian Federation, *United States—Certain Measures on Steel and Aluminum Products*, WTO Doc. WT/DS544/4 (Apr. 18, 2018); Request to Join Consultations—Communication from the European Union, *United States—Certain Measures on Steel and Aluminum Products*, WTO Doc. WT/DS544/7 (Apr. 19, 2018); Request to Join Consultations—Communication from Hong Kong, China, *United States—Certain Measures on Steel and Aluminum Products*, WTO Doc. WT/DS544/6 (Apr. 19, 2018).

<sup>42</sup> Request for Consultations by Mexico, *United States—Certain Measures on Steel and Aluminum Products*, WTO Doc. WT/DS551/1 (June 5, 2018); Request for Consultations by Canada, *United States—Certain Measures on Steel and Aluminum Products*, WTO Doc. WT/DS550/1 (June 1, 2018); Request for Consultations by the European Union, *United States—Certain Measures on Steel and Aluminum Products*, WTO Doc. WT/DS548/1 (June 1, 2018); Request for Consultations by India, *United States—Certain Measures on Steel and Aluminum Products*, WTO Doc. WT/DS547/1 (May 18, 2018). Various countries have requested to join these consultations.

<sup>43</sup> Complaint, *Severstal Export GMBH v. United States of America* (No. 18-00057) (U.S. Ct. Int'l Trade Mar. 22, 2018).

<sup>44</sup> *Id.* at 1.

<sup>45</sup> *Id.*; see also Todd N. Tucker, *First Case Filed Against Administration's National Security Motivated Tariffs*, LAWFARE (Apr. 6, 2018), at <https://www.lawfareblog.com/first-case-filed-against-administrations-national-security-motivated-tariffs> (discussing the case and subsequent developments).

<sup>46</sup> U.S. Dep't of Commerce Press Release, U.S. Department of Commerce Initiates Section 232 Investigation into Auto Imports (May 23, 2018), at <https://www.commerce.gov/news/press-releases/2018/05/us-department-commerce-initiates-section-232-investigation-auto-imports> [<https://perma.cc/A8XL-M79N>]; see also White House Press Release, Statement from the President on Potential National Security Investigation into Automobile Imports (May 23, 2018), at <https://www.whitehouse.gov/briefings-statements/statement-president-potential-national-security-investigation-automobile-imports> [<https://perma.cc/JL6S-RRHU>].

*United States Moves Forward with Tariffs and Requests WTO Consultations in Response to Certain Trade Practices by China*

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Trade tensions between the United States and China have escalated under the Trump administration. Some of this tension has resulted from the steel and aluminum tariffs imposed by the United States on most of its trading partners in the spring of 2018.<sup>1</sup> Another major source of conflict relates to President Trump's concerns with China's perceived unfair practices in relation to intellectual property and technology rights. The Trump administration has addressed these concerns both by pursuing unilateral responses and seeking relief through the World Trade Organization (WTO).

On August 14, 2017, Trump directed the U.S. Office of the Trade Representative (USTR) to "determine, consistent with . . . the Trade Act of 1974 . . . , whether to investigate any of China's laws, policies, practices, or actions that may be unreasonable or discriminatory and that may be harming American intellectual property rights, innovation, or technology development."<sup>2</sup> On August 18, 2017, USTR responded to this directive by initiating an investigation under Section 301 of the Trade Act,<sup>3</sup> which it describes as "a key enforcement tool that may be used to address a wide variety of unfair acts, policies, and practices of U.S. trading partners."<sup>4</sup>

In the final report for this investigation on March 22, 2018, USTR concluded that China was engaging in a number of unfair trade practices related to intellectual property and technology.<sup>5</sup> As summarized in an accompanying press release, the report reached four distinct conclusions related to Chinese trade practices:

- (1) China uses foreign ownership restrictions, including joint venture requirements, equity limitations, and other investment restrictions, to require or pressure technology transfer from U.S. companies to Chinese entities. China also uses administrative review and licensing procedures to require or pressure technology transfer, which, inter alia, undermines the value of U.S. investments and technology and weakens the global competitiveness of U.S. firms.
- (2) China imposes substantial restrictions on, and intervenes in, U.S. firms' investments and activities, including through restrictions on technology licensing terms. These restrictions deprive U.S. technology owners of the ability to bargain and set market-

<sup>1</sup> These developments are discussed in Jean Galbraith, [Contemporary Practice of the United States](#), 112 AJIL 499 (2018).

<sup>2</sup> Presidential Memorandum of Aug. 14, 2017, Addressing China's Laws, Policies, Practices, and Actions Related to Intellectual Property, Innovation, and Technology, 82 Fed. Reg. 39007, 39007 (Aug. 17, 2017).

<sup>3</sup> Office of the U.S. Trade Rep. Press Release, USTR Announces Initiation of Section 301 Investigation of China (Aug. 18, 2017), at <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2017/august/ustr-announces-initiation-section> [<https://perma.cc/KDE5-NVFB>].

<sup>4</sup> OFFICE OF THE U.S. TRADE REP., FINDINGS OF THE INVESTIGATION INTO CHINA'S ACTS, POLICIES, AND PRACTICES RELATED TO TECHNOLOGY TRANSFER, INTELLECTUAL PROPERTY, AND INNOVATION UNDER SECTION 301 OF THE TRADE ACT OF 1974, at 3 (2018) [hereinafter USTR Section 301 Report]; see also *infra* note 20 and accompanying text (describing Section 301 in more detail).

<sup>5</sup> See generally *id.*

- based terms for technology transfer. As a result, U.S. companies seeking to license technologies must do so on terms that unfairly favor Chinese recipients.
- (3) China directs and facilitates the systematic investment in, and acquisition of, U.S. companies and assets by Chinese companies to obtain cutting-edge technologies and intellectual property and to generate large-scale technology transfer in industries deemed important by Chinese government industrial plans.
  - (4) China conducts and supports unauthorized intrusions into, and theft from, the computer networks of U.S. companies. These actions provide the Chinese government with unauthorized access to intellectual property, trade secrets, or confidential business information, including technical data, negotiating positions, and sensitive and proprietary internal business communications, and they also support China's strategic development goals, including its science and technology advancement, military modernization, and economic development.<sup>6</sup>

That same day, Trump issued a memorandum noting these findings and directing USTR to take two actions in response: first, pursuing tariff increases; and second, seeking WTO dispute settlement "to address China's discriminatory licensing practices."<sup>7</sup>

Regarding tariffs, Trump specifically directed USTR to "publish a proposed list of products and any intended tariff increases within 15 days. . . ."<sup>8</sup> When released on April 3 by USTR, the list contained roughly 1,300 separate tariff lines aimed at \$50 billion of Chinese imports, subject to a notice and comment period with the final list to be determined thereafter.<sup>9</sup>

Over the following several months, China and the United States engaged in a series of negotiations and further actions relating to these proposed tariffs. China at one point threatened retaliatory tariffs on \$50 billion of U.S. goods,<sup>10</sup> leading the United States to threaten tariffs on an additional \$100 billion of Chinese goods.<sup>11</sup> At other times China signaled a willingness to make concessions to the United States, including making a reduction in tariffs on

<sup>6</sup> Office of the U.S. Trade Rep. Press Release, President Trump Announces Strong Actions to Address China's Unfair Trade (Mar. 22, 2018), at <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2018/march/president-trump-announces-strong> [<https://perma.cc/XS8U-A3H5>].

<sup>7</sup> Presidential Memorandum of March 22, 2018, on the Actions by the United States Related to the Section 301 Investigation of China's Laws, Policies, Practices, or Actions Related to Technology Transfer, Intellectual Property, and Innovation, 83 Fed. Reg. 13099, 13100 (Mar. 27, 2018). In addition, the memorandum instructed the secretary of the Treasury to "propose executive branch action . . . to address concerns about investment in the United States directed or facilitated by China in industries or technologies deemed important to the United States." *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> Office of the U.S. Trade Rep. Press Release, Under Section 301 Action, USTR Releases Proposed Tariff List on Chinese Products (Apr. 3, 2018), at <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2018/april/under-section-301-action-ustr> [<https://perma.cc/7T78-QWBY>].

<sup>10</sup> See *China Announces Additional Tariffs on \$50 Billion of U.S. Goods*, REUTERS (Apr. 4, 2018), at <https://www.reuters.com/article/us-usa-trade-china-tariffs-statement/china-announces-additional-tariffs-on-50-billion-of-u-s-goods-idUSKCN1HB0W6>. By this time, China had already announced retaliatory tariffs on U.S. goods in response to the new U.S. tariffs on steel and aluminum. See Galbraith, *supra* note 1, at 500.

<sup>11</sup> White House Press Release, What You Need to Know About President Donald J. Trump's Actions Responding to China's Unfair Trade Practices (Apr. 6, 2018), at <https://www.whitehouse.gov/briefings-statements/need-know-president-donald-j-trumps-actions-responding-chinas-unfair-trade-practices> [<https://perma.cc/678G-JHB3>].

imported cars and their parts<sup>12</sup> and offering to purchase more American goods.<sup>13</sup> For its part, the United States at one point suggested that it would not move forward with its proposed tariffs pending negotiations,<sup>14</sup> but, as of the end of May, it had decided otherwise. On May 29, the White House released a statement announcing that, in accordance with the Section 301 report:

the United States will impose a 25 percent tariff on \$50 billion of goods imported from China containing industrially significant technology, including those related to the “Made in China 2025” program. The final list of covered imports will be announced by June 15, 2018, and tariffs will be imposed on those imports shortly thereafter.<sup>15</sup>

On June 15, the Trump administration finalized its list of imports subject to the tariffs, with implementation to begin on July 6, leading China to announce that it would impose comparable tariffs in response.<sup>16</sup>

As a matter of U.S. domestic law, the authority of the Trump administration to impose these tariffs pursuant to Section 301 of the Trade Act of 1974 may depend on the extent to which China’s perceived unfair practices lie outside the reach of existing WTO agreements. In 1994, when seeking congressional approval for the Uruguay Round, the Clinton administration submitted a statement of administrative action, which, among other things, specified how the executive branch’s use of Section 301 would relate to the newly revitalized international trade regime:

[F]or [Section 301] investigations that involve an alleged violation of a Uruguay Round agreement or the impairment of U.S. benefits under such an agreement . . . the Trade Representative will

<sup>12</sup> Keith Bradsher, *China Cuts Car Tariffs, in a Small Offering to the U.S. on Trade*, N.Y. TIMES (May 22, 2018), at <https://www.nytimes.com/2018/05/22/business/china-cuts-auto-tariffs.html>.

<sup>13</sup> See, e.g., Ana Swanson & Alan Rappoport, *U.S. Suspends Tariffs on China, Stoking Fears of a Loss of Leverage*, N.Y. TIMES (May 20, 2018), at <https://www.nytimes.com/2018/05/20/us/politics/mnuchin-kudlow-china-trade.html>.

<sup>14</sup> *Id.* For discussion of earlier U.S. negotiating demands and their relationship to international trade law, see Julia Qin, *Could the US-China Trade Conflict Be Dealt with within the WTO Framework?*, INT’L ECON. L. & POL’Y BLOG (May 5, 2018), at <http://worldtradelaw.typepad.com/ielpblog/2018/05/could-the-us-china-trade-conflict-be-dealt-with-within-the-wto-framework.html>.

<sup>15</sup> White House Press Release, *Statement on Steps to Protect Domestic Technology and Intellectual Property from China’s Discriminatory and Burdensome Trade Practices* (May 29, 2018), at <https://www.whitehouse.gov/briefings-statements/statement-steps-protect-domestic-technology-intellectual-property-chinas-discriminatory-burdensome-trade-practices> [<https://perma.cc/RG79-ZBEX>] (also announcing a plan to implement, for national security reasons, “specific investment restrictions and enhanced export controls for Chinese persons and entities related to the acquisition of industrially significant technology”). Made in China 2025 is a state-sponsored program aimed at bolstering China’s advanced manufacturing capabilities. See Kristen Hopewell, *What Is ‘Made in China 2025’—and Why Is It a Threat to Trump’s Trade Goals?*, WASH. POST (May 3, 2018), at [https://www.washingtonpost.com/news/monkey-cage/wp/2018/05/03/what-is-made-in-china-2025-and-why-is-it-a-threat-to-trumps-trade-goals/?utm\\_term=.0f8bf76f8b14](https://www.washingtonpost.com/news/monkey-cage/wp/2018/05/03/what-is-made-in-china-2025-and-why-is-it-a-threat-to-trumps-trade-goals/?utm_term=.0f8bf76f8b14) (reporting on the program’s goals and methods of attainment, potential impact on the U.S. market, and the efficacy of the U.S. response).

<sup>16</sup> David J. Lynch & Emily Rauhala, *With Tariffs, Trump Starts Unraveling a Quarter-Century of U.S.-China Economic Ties*, WASH. POST (June 15, 2018), at [https://www.washingtonpost.com/business/economy/trump-imposes-import-taxes-on-chinese-goods-and-warns-of-additional-tariffs/2018/06/15/da909ecc-7092-11e8-bf86-a2351b5ece99\\_story.html?utm\\_term=.b2bf1057ca82](https://www.washingtonpost.com/business/economy/trump-imposes-import-taxes-on-chinese-goods-and-warns-of-additional-tariffs/2018/06/15/da909ecc-7092-11e8-bf86-a2351b5ece99_story.html?utm_term=.b2bf1057ca82).

- invoke [Dispute Settlement Understanding (DSU)] dispute settlement procedures, as required under current law;
- base any section 301 determination that there has been a violation or denial of U.S. rights under the relevant agreement on the panel or Appellate Body findings adopted by the [Dispute Settlement Body (DSB)].
- following adoption of a favorable panel or Appellate Body report, allow the defending party a reasonable period of time to implement the report's recommendations; and
- if the matter cannot be resolved during that period, seek authority from the DSB to retaliate.

Neither section 301 nor the DSU will require the Trade Representative to invoke DSU dispute settlement procedures if the Trade Representative does not consider that a matter involves a Uruguay Round agreement. Section 301 will remain fully available to address unfair practices that do not violate U.S. rights or deny U.S. benefits under the Uruguay Round agreements and, as in the past, such investigations will not involve recourse to multilateral dispute settlement procedures.<sup>17</sup>

In addition to making clear that it would wait to impose retaliatory measures pursuant to Section 301 for issues involving U.S. rights under WTO agreements, the Clinton administration also acknowledged “the expectation of the Congress that future Administrations” would abide by the statement of administrative action.<sup>18</sup> And in its law approving the Uruguay Round, Congress explicitly “approve[d] . . . the statement of administrative action.”<sup>19</sup>

Perhaps in an attempt to sidestep the legal concerns that would arise from an explicit attempt to disregard the 1994 statement of administrative action, USTR has described its Section 301 investigation as focused not on violations of international trade law per se, but rather more generally on “acts, policies or practices that are unreasonable or discriminatory and that burden or restrict U.S. Commerce.”<sup>20</sup> Nonetheless, there are now ongoing proceedings relating to the Section 301 investigation in the WTO, where both the United States and China have requested consultations.

<sup>17</sup> H.R. DOC. NO. 103-316, at 1034–35 (1994); *see also* United States – Sections 301–310 of the Trade Act of 1974, Panel Report of Dec. 22, 1999, WT/DS152/R, at VII.1545 (concluding that this is a “lawful and effective” curtailment of USTR’s authority).

<sup>18</sup> H.R. DOC. NO. 103-316, *supra* note 17, at 656 (applying this language generally to the statement of administrative action).

<sup>19</sup> Pub. L. 103-465, at § 101(a)(2), 108 Stat. 4809, 4814 (1994); *see also id.*, § 102(d), 108 Stat. at 4819 (describing this statement of administrative action as “an authoritative expression” of interpretation).

<sup>20</sup> USTR Section 301 Report, *supra* note 4, at 3 (describing this language as coming from the “most relevant” statutory source of authority). This language tracks Section 301(b), which does not reference international trade law and provides USTR with discretionary authority to respond to unfair trade practices, as compared to Section 301(a), which requires USTR to respond to violations of international trade law. *See* 19 U.S.C. § 2411(a) & (b). In describing Section 301, USTR did not mention the statement of administrative action. *See* USTR Section 301 Report, *supra* note 4, at 3–4. For a more thorough discussion of the legal framework surrounding Section 301 investigations and the relevant implications for this current dispute, *see* CAITLAIN DEVEREAUX LEWIS, TRICKS OF THE TRADE: SECTION 301 INVESTIGATION OF CHINESE INTELLECTUAL PROPERTY PRACTICES CONCLUDES (PART I), CONG. RES. SERV. (Mar. 29, 2018); CAITLAIN DEVEREAUX LEWIS, TRICKS OF THE TRADE: SECTION 301 INVESTIGATION OF CHINESE INTELLECTUAL PROPERTY PRACTICES CONCLUDES (PART II), CONG. RES. SERV. (Mar. 29, 2018).

The United States filed its request for consultations at the WTO on March 23, 2018 as part of President Trump's response to the Section 301 investigation.<sup>21</sup> Focusing on one aspect of the findings of the Section 301 investigation, it argued that, "China deprives foreign intellectual property rights holders of the ability to protect their intellectual property rights in China as well as freely negotiate market-based terms in licensing and other technology-related contracts."<sup>22</sup>

China filed its own request for consultations on April 3, 2018, responding to the initial proposed list of tariffs announced by the United States.<sup>23</sup> It asserted that these proposed tariffs would violate Article I.1 and II.1(a) and (b) of the General Agreement on Tariffs and Trade (GATT) 1994, and also that they would violate Article 23 of the DSU, "because the measures at issue fail to recourse to [sic], and abide by, the rules and procedures of the DSU."<sup>24</sup> The Trump administration responded by saying that it was willing to engage in consultations, even though no tariffs had been imposed to date and the issue was therefore premature.<sup>25</sup>

An additional strain on trade relations between China and the United States that exists outside of the confines of the Section 301 investigation is the fate of Zhongxing Telecommunications Equipment (ZTE) Corporation, a company recognized as "China's second-largest maker of telecommunications equipment."<sup>26</sup> In mid-April the Trump administration announced that, effective immediately, it was banning ZTE from making use of technology exports from the United States.<sup>27</sup> This ban resulted from ZTE's failure to punish employees who the United States had found to be in violation of American sanctions against Iran and North Korea,<sup>28</sup> a failure which in turn violated an earlier settlement reached between the United States and ZTE.<sup>29</sup> Less than a month after the order was imposed ZTE appeared to be on the verge of collapse, announcing that it had ceased "major operating activities."<sup>30</sup>

<sup>21</sup> Office of the U.S. Trade Rep. Press Release, Following President Trump's Section 301 Decisions, USTR Launches New WTO Challenge Against China (Mar. 23, 2018), at <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2018/march/following-president-trump%E2%80%99s-section-58AC-32WZ>.

<sup>22</sup> Request for Consultations by the United States, *China – Certain Measures Concerning the Protection of Intellectual Property Rights*, at 1, WTO Doc. IP/D/38; WT/DS542/1 (Mar. 23, 2018) (citing Article 64 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement)). Japan and the EU are two of several parties who have requested to join the consultations.

<sup>23</sup> Request for Consultations by China, *United States – Tariff Measures on Certain Goods From China*, at 2, WTO Doc. G/L/1219; WT/DS543/1 (Apr. 4, 2018) [hereinafter Request for Consultations by China]; cf. *US "Section 301" Action Against China's Intellectual Property Regime Questioned at WTO Goods Council*, WORLD TRADE ORG. (Mar. 26, 2018), at [https://www.wto.org/english/news\\_e/news18\\_e/good\\_28mar18\\_e.htm](https://www.wto.org/english/news_e/news18_e/good_28mar18_e.htm) (summarizing concerns raised by China with regard to the tariffs at a meeting of the Goods Council).

<sup>24</sup> Request for Consultations by China, *supra* note 23.

<sup>25</sup> Communication from the United States, *United States – Tariff Measures on Certain Goods from China*, WTO Doc. WT/DS543/2 (Apr. 13, 2018). For China's further response, see Communication from China, *United States – Tariff Measures on Certain Goods from China*, WTO Doc. WT/DS543/3 (Apr. 27, 2018).

<sup>26</sup> Maul Mozur & Ana Swanson, *Chinese Tech Company Blocked from Buying American Components*, N.Y. TIMES (Apr. 16, 2018), at <https://www.nytimes.com/2018/04/16/technology/chinese-tech-company-blocked-from-buying-american-components.html>.

<sup>27</sup> Order Activating Suspended Denial Order Relating to Zhongxing Telecommunications Equipment Corporation and Zte Kangxu, 83 Fed. Reg. 17644, 17647 (Apr. 23, 2018).

<sup>28</sup> *Id.* at 17646.

<sup>29</sup> *Id.* at 17645.

<sup>30</sup> Raymon Zhong, *Chinese Tech Giant on Brink of Collapse in New U.S. Cold War*, N.Y. TIMES (May 9, 2018), at <https://www.nytimes.com/2018/05/09/technology/zte-china-us-trade-war.html>.

The fate of ZTE has now become intertwined with the broader China-U.S. trade negotiations. On May 13, Trump indicated that he and President Xi Jinping were working together to try and stop the collapse of ZTE.<sup>31</sup>

*Developments Relating to U.S. Trade Negotiations—KORUS, NAFTA, and Trade Promotion Authority*

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Consistent with his approach on the campaign trail, President Trump has demonstrated a continued interest in revamping U.S. trade agreements. By the late spring of 2018, the Trump administration had negotiated modest changes to the United States–Republic of Korea Free Trade Agreement (KORUS) in favor of U.S. interests. It had yet to reach any final agreement with regard to the North American Free Trade Agreement (NAFTA), despite the expiration of an initial deadline that was designed to ensure adequate time for a vote on the negotiated agreement by the present Congress. To ease the passage of future trade deals, Trump has triggered the three-year extension of a process that provides expedited congressional consideration of negotiated trade agreements.

On March 28, 2018, U.S. Trade Representative Robert Lighthizer released a joint statement with South Korea’s Minister for Trade announcing that “the United States and the Republic of Korea have reached an agreement in principle on the general terms of amendments and modifications to the United States–Republic of Korea Free Trade Agreement.”<sup>1</sup> This agreement is the culmination of a review initiated in 2017, which involved two special sessions of the Joint Committee established under KORUS’s Article 22.2.<sup>2</sup> Under this provision, in addition to various supervisory obligations, the Joint Committee may “consider amendments to this Agreement or make modifications to the commitments therein.”<sup>3</sup>

<sup>31</sup> Donald J. Trump (@realDonaldTrump), TWITTER (May 13, 2018, 11:01 AM), at <https://twitter.com/realDonaldTrump/status/995680316458262533>; see also Ana Swanson, *Trump Administration Plans to Revive ZTE, Prompting Backlash*, N.Y. TIMES (May 25, 2018), at <https://www.nytimes.com/2018/05/25/us/politics/trump-trade-zte.html> (reporting that the Commerce Department had reached a deal with ZTE that would lift the ban in exchange for the payment of a fine and internal restructuring). As of late June, members of Congress had begun efforts to block such a deal through legislative action. See Sarah Ferris & John Bresnahan, *Senate GOP Fires Another Warning Shot at Trump over Chinese Telecom Giant*, POLITICO (June 25, 2018), at <https://www.politico.com/story/2018/06/25/trump-zte-senate-chinese-telecom-671845> (describing some of these efforts, including a provision passed by the Senate as part of a broader appropriations bill).

<sup>1</sup> Office of the U.S. Trade Rep. Press Release, Joint Statement by the United States Trade Representative Robert E. Lighthizer and Republic of Korea Minister for Trade Hyun Chong Kim (Mar. 28, 2018), at <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2018/march/joint-statement-united-states-trade> [<https://perma.cc/T4PK-6677>] [hereinafter KORUS Joint Statement].

<sup>2</sup> Office of the U.S. Trade Rep. Press Release, USTR Calls a Special Session Under the U.S.-Korea Free Trade Agreement (July 12, 2017), at <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2017/july/ustr-calls-special-session-under-us> [<https://perma.cc/5GTC-E4HH>]; Office of the U.S. Trade Rep. Press Release, USTR Announces Second Special Session of the U.S.-Korea FTA Joint Committee (Sept. 22, 2017), at <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2017/september/ustr-announces-second-special> [<https://perma.cc/4AWB-XV44>].

<sup>3</sup> United States–Republic of Korea Free Trade Agreement, Art. 22.2, para. 3(c), June 30, 2007.

At the time of the announcement, negotiators were still finalizing the terms of the agreement, which remain “subject to domestic procedures in both nations before provisions can be brought into force.”<sup>4</sup> The announcement nonetheless identified what appear to be the main revisions. According to the South Korean Ministry of Trade:

Under the updated agreement, Korea will allow the U.S. to extend its 25 percent tariff on imports of Korean pickup trucks by additional 20 years to 2041. The tariff was originally scheduled to expire in 2021. Korea will also allow U.S. automakers selling fewer than 50,000 units per year in Korea to be exempt from Korean safety standards as long as they meet U.S. safety standards, up from 25,000 vehicles previously.<sup>5</sup>

A press release from the White House noted these same terms, while emphasizing that “South Korea is simplifying the sales environment for U.S. cars and parts by taking into account U.S. environmental and emissions standards.”<sup>6</sup> South Korea agreed to “expand the number of ‘eco-credits’ available for U.S. automakers to meet South Korean emissions standards” and to take “U.S. corporate average fuel economy regulations into account” when setting fuel economy standards.<sup>7</sup> The agreement on a renegotiated KORUS occurred at the same time that the two countries reached an understanding whereby South Korea obtained an exemption from recently imposed U.S. tariffs on steel imports in exchange for reducing the amount of steel it exports to the United States.<sup>8</sup>

When the negotiations were initiated in 2017, several members of Congress, including the chairmen of the House Ways and Means Committee and the Senate Finance Committee, signaled some unease regarding the authority of the Joint Committee in a letter to Lighthizer:

[W]hile KORUS established a Joint Committee under Article 22.2 to supervise implementation, consider ways to further enhance trade relations between the Parties, and consider amendments to the Agreement, the United States cedes no sovereignty to the Joint Committee. Indeed, any changes affecting the United States resulting from the work of that Joint Committee cannot take effect unless either the President exercises his authorities as delegated to him by Congress or Congress makes changes to U.S. statutes.<sup>9</sup>

As negotiated, the amendments do not appear to contain new concessions by the United States to South Korea. This will likely enable the executive branch to move forward with

<sup>4</sup> KORUS Joint Statement, *supra* note 1.

<sup>5</sup> Republic of Korea Ministry of Trade, Industry and Energy Press Release, Korea, US Reach Agreement on Trade Deal and Steel Tariff Exemption (Mar. 26, 2018), at [http://english.motie.go.kr/en/pc/photonews/bbs/bbsList.do?bbs\\_cd\\_n=1&bbs\\_seq\\_n=678](http://english.motie.go.kr/en/pc/photonews/bbs/bbsList.do?bbs_cd_n=1&bbs_seq_n=678) [<https://perma.cc/AUS2-L6L8>].

<sup>6</sup> White House Press Release, President Donald J. Trump is Fulfilling His Promise on The U.S.–Korea Free Trade Agreement and on National Security (Mar. 28, 2018), at <https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-fulfilling-promise-u-s-korea-free-trade-agreement-national-security> [<https://perma.cc/Y339-ARNB>].

<sup>7</sup> *Id.* (also noting a few other aspects of the deal).

<sup>8</sup> See Jean Galbraith, *Contemporary Practice of the United States*, 112 AJIL 501 (2018).

<sup>9</sup> Letter from Kevin Brady, Chairman House Ways and Means Committee, Orrin Hatch, Chairman Senate Finance Committee, Richard E. Neal, Ranking Member House Ways and Means Committee, and Ron Wyden, Ranking Member Senate Finance Committee, to Robert E. Lighthizer, U.S. Trade Representative (July 17, 2017), available at <https://waysandmeans.house.gov/wp-content/uploads/2017/07/2017-07-17-KORUS-Big-4-Letter-to-Lighthizer.pdf>. The letter noted that the Trump administration had not taken the steps needed to ensure that any amendments would receive expedited consideration from Congress. *Id.*

ratifying the amendments without seeking congressional approval.<sup>10</sup> In terms of implementation, however, a congressional law may be needed for the United States to take advantage of the negotiated right to extend tariffs on imported Korean trucks for an additional twenty years.

By the end of May 2018, no announcement had been made of the agreement's finalization and its text had not been released. In late March, Trump suggested that "I may hold it up until after a deal is made with North Korea."<sup>11</sup> He continued, "Does everybody understand that? You know why, right? You know why? Because it's a very strong card."<sup>12</sup> On April 24, however, Trump referenced the deal by stating, "[i]n South Korea, on our trade deal, we're doing very well."<sup>13</sup>

The renegotiation of NAFTA has proceeded less smoothly. Seven rounds of negotiations had taken place by the middle of May 2018, but no agreement had been reached.<sup>14</sup> The negotiations thus continued past the initial May 17 deadline set by Speaker Paul Ryan for when the Trump administration needed to provide the negotiated deal to Congress to ensure review prior to the end of the session.<sup>15</sup> (Ryan later relaxed this deadline, stating that there might be "wiggle room."<sup>16</sup>)

A variety of issues appear to be blocking progress, including disagreements between the United States and Mexico regarding regulations for the auto industry and resistance to U.S. demands that the agreement include a sunset clause that would allow NAFTA to expire every five years if not renegotiated.<sup>17</sup> Disagreements have also risen over the Trump administration's desire to secure changes in Mexico's immigration policy as a part of the agreement, including an outcome that would allow the United States to turn asylum seekers from other Central American countries back at the border.<sup>18</sup> Tensions have been exacerbated by other

<sup>10</sup> See Jeffrey J. Schott, *Fixing the KORUS FTA—Without Fireworks*, PETERSON INST. INT'L ECON. (Jan. 26, 2018), at <https://piee.com/blogs/trade-investment-policy-watch/fixing-korus-fta-without-fireworks> (noting that "Korean officials have been pragmatic in response to US demands for additional Korean concessions without complementary US reforms" as they "recogniz[e] that US officials can only address requests for KORUS FTA revisions that do not require congressional approval"); Ellyn Ferguson, *White House Says Revised South Korea Trade Pact Within Reach*, ROLL CALL (Mar. 28, 2018), at <https://www.rollcall.com/news/politics/white-house-says-revised-south-korea-trade-pact-within-reach> (reporting that "Congress does not have to approve the final agreement").

<sup>11</sup> Katie Rogers & Jim Tankersley, *Trump Heralds South Korea Trade Deal, Then Says He Might Delay It*, N.Y. TIMES (Mar. 29, 2018), at <https://www.nytimes.com/2018/03/29/us/politics/trump-infrastructure-trade-deal-south-korea.html>.

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

<sup>13</sup> Donald J. Trump, Remarks Prior to an Expanded Bilateral Meeting with President Emmanuel Macron of France, 2018 DAILY COMP. PRES. DOC. 2 (Apr. 24, 2018).

<sup>14</sup> Office of the U.S. Trade Rep. Press Release, USTR Robert Lighthizer Issues Statement on Status of NAFTA Renegotiation (May 14, 2018), at <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2018/may/ustr-robert-lighthizer-issues-statement> [<https://perma.cc/4LLV-PH7J>].

<sup>15</sup> Adam Behsudi, *Ryan Says May 17 Is Deadline to Assure 2018 NAFTA Vote*, POLITICO (May 10, 2018), at <https://www.politico.com/story/2018/05/10/paul-ryan-nafta-vote-deadline-1200989>.

<sup>16</sup> Vicki Needham, *Lighthizer says NAFTA Countries Are "Nowhere" Near Reaching a Deal*, THE HILL (May 17, 2018), at <http://thehill.com/policy/finance/388263-lighthizer-says-nafta-countries-are-nowhere-near-reaching-a-deal>.

<sup>17</sup> Maham Abedi, *4 Challenges NAFTA Negotiations Are Facing as Deadline Looms*, GLOBAL NEWS (May 15, 2018), at <https://globalnews.ca/news/4209888/nafta-negotiations-disagreements>.

<sup>18</sup> Ana Swanson & Elisabeth Malkin, *Chance of NAFTA Deal in 2018 Diminishes as Talks Drag Past Congressional Deadline*, N.Y. TIMES (May 17, 2018), <https://www.nytimes.com/2018/05/17/us/politics/nafta-deal-deadline-congress.html>.

threats and actions by the Trump administration, including assertions that the United States might exit the agreement entirely<sup>19</sup> and the imposition of steel and aluminum tariffs, which the president has linked to the failure to renegotiate NAFTA.<sup>20</sup> On May 17, Lighthizer described the negotiators as “nowhere near close to a deal.”<sup>21</sup>

In terms of domestic legal process, the Bipartisan Congressional Trade Priorities and Accountability Act of 2015 allows for an expedited process for congressional approval for trade agreements,<sup>22</sup> a process known as Trade Promotion Authority (TPA). Assuming that a specific set of circumstances are met, TPA ensures that the agreement receives floor consideration in a timely manner, imposes limits on debate, and prohibits amendments.<sup>23</sup> Passage of the agreement requires only an up-or-down vote.<sup>24</sup> TPA is designed to expire by July 1, 2018,<sup>25</sup> unless an extension is requested by the president and “neither House of Congress adopts an extension disapproval resolution . . . before July 1, 2018.”<sup>26</sup> In that case, TPA is extended until July 1, 2021.<sup>27</sup>

On March 20, 2018, Trump requested the extension of TPA.<sup>28</sup> In his letter to Congress, he noted the ongoing NAFTA renegotiations and more generally his administration’s pursuit of “new and better trade deals for America’s workers, farmers, ranchers, and businesses.”<sup>29</sup> He described TPA’s extension as “essential to fulfill that task and to demonstrate to our trading partners that my Administration and the Congress share a common goal when it comes to trade.”<sup>30</sup> As of the end of May, neither the House nor the Senate had adopted a resolution of disapproval of the extension.

<sup>19</sup> *E.g.*, Donald J. Trump (@realDonaldTrump), TWITTER (Apr. 1, 2018, 10:25 AM), at <https://twitter.com/realDonaldTrump/status/980451155548491777> (“Mexico is doing very little if not NOTHING, at stopping people from flowing into Mexico through their Southern Border, and then into the U.S. They laugh at our dumb immigration laws. They must stop the big drug and people flows, or I will stop their cash cow, NAFTA. NEED WALL!”).

<sup>20</sup> Donald J. Trump (@realDonaldTrump), TWITTER (Mar. 5, 2018, 6:47 AM), at <https://twitter.com/realDonaldTrump/status/970626966004162560>; *see also* Galbraith, *supra* note 8, at 502.

<sup>21</sup> Needham, *supra* note 16.

<sup>22</sup> Bipartisan Congressional Trade Priorities and Accountability Act of 2015, Pub. L. No. 114-26, 129 Stat. 320 (codified at 19 U.S.C §§ 4201–4210).

<sup>23</sup> CHRISTOPHER M. DAVIS & IAN F. FERGUSSON, TRADE PROMOTION AUTHORITY (TPA): FREQUENTLY ASKED QUESTIONS, CONG. RES. SERV. 21 (Apr. 10, 2018).

<sup>24</sup> *Id.* at 1.

<sup>25</sup> 19 U.S.C. § 4202(a)(1)(A)(i).

<sup>26</sup> *Id.* § 4202(c)(1)(B). This use of a one-house veto may be constitutionally questionable under *INS v. Chadha*, 462 U.S. 919 (1983), which invalidated a one-house veto provision on the ground that it was inconsistent with the Constitution’s Bicameralism and Presentment Clauses. Nonetheless, as a practical matter, Congress may be in a position to take account of any use of a one-house veto in deciding whether to engage in the expedited approval process.

<sup>27</sup> 19 U.S.C. § 4202(c)(1)(B).

<sup>28</sup> H.R. Doc. No. 115-104, at 1 (2018).

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

<sup>30</sup> *Id.*

## USE OF FORCE, ARMS CONTROL, AND NONPROLIFERATION

*President Trump Withdraws the United States from the Iran Deal and Announces the Reimposition of Sanctions*

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As a candidate, Donald Trump made clear that, if elected, he would “dismantle the disastrous deal with Iran.”<sup>1</sup> Nonetheless, the Joint Comprehensive Plan of Action (JCPOA) remained in place throughout 2017, and all four International Atomic Energy Agency (IAEA) reports that year verified Iran’s compliance with its nuclear commitments under it.<sup>2</sup> On January 12, 2018, President Trump warned that he would withdraw from the JCPOA by mid-May unless he “secure[d] our European allies’ agreement to fix [its] terrible flaws.”<sup>3</sup> No such agreement materialized and, on May 8, Trump announced his decision to withdraw. He also ordered the reimposition of robust primary and secondary sanctions that had been previously waived pursuant to the JCPOA.

Under the JCPOA, the five permanent members of the UN Security Council, Germany, and the European Union agreed to relieve Iran from nuclear-related sanctions in exchange for its agreement to place verifiable limits on its nuclear program.<sup>4</sup> Shortly after the JCPOA was reached in July 2015, the Security Council passed Resolution 2231 endorsing the deal.<sup>5</sup> This resolution “[c]alls upon all Members States, regional organizations and international organizations to take such actions as may be appropriate to support the implementation of the JCPOA, including by . . . refraining from actions that undermine implementation of commitments under the JCPOA.”<sup>6</sup> Also by the terms of Resolution 2231, “[a]ll states . . . are called upon to comply” with a statement made by all parties to the JCPOA except Iran, which in turn provides that “Iran is called upon not to undertake any activity related to ballistic missiles designed to be capable of delivering nuclear weapons” for an eight-year period.<sup>7</sup> Pursuant

<sup>1</sup> Sarah Begley, *Read Donald Trump’s Speech to AIPAC*, TIME (Mar. 21, 2016), at <http://time.com/4267058/donald-trump-aipac-speech-transcript> (providing the transcript of a Trump campaign speech in which he called this his “number-one priority”).

<sup>2</sup> IAEA Director General Press Release, Verification and Monitoring in the Islamic Republic of Iran in Light of United Nations Security Council Resolution 2231 (2015) (Nov. 13, 2017), available at <https://www.iaea.org/sites/default/files/17/11/gov2017-48.pdf>; IAEA Director General Press Release, Verification and Monitoring in the Islamic Republic of Iran in Light of United Nations Security Council Resolution 2231 (2015) (Aug. 31, 2017), available at <https://www.iaea.org/sites/default/files/gov2017-35.pdf>; IAEA Director General Press Release, Verification and Monitoring in the Islamic Republic of Iran in Light of United Nations Security Council Resolution 2231 (2015) (June 2, 2017), available at <https://www.iaea.org/sites/default/files/gov2017-24.pdf>; IAEA Director General Press Release, Verification and Monitoring in the Islamic Republic of Iran in Light of United Nations Security Council Resolution 2231 (2015) (Feb. 24, 2017), available at <https://www.iaea.org/sites/default/files/gov2017-10.pdf>.

<sup>3</sup> Donald J. Trump, Statement on the Joint Comprehensive Plan of Action to Prevent Iran From Obtaining a Nuclear Weapon, 2018 DAILY COMP. PRES. DOC. 25 (Jan. 12, 2018) [hereinafter Trump Statement].

<sup>4</sup> Joint Comprehensive Plan of Action, July 14, 2015, 55 ILM 98, 108 (2016) [hereinafter JCPOA]. For further context, see Kristina Daugirdas & Julian Davis Mortenson, Contemporary Practice of the United States, 110 AJIL 789 (2016); Kristina Daugirdas & Julian Davis Mortenson, Contemporary Practice of the United States, 109 AJIL 649 (2015).

<sup>5</sup> SC Res. 2231, para. 1 (July 20, 2015).

<sup>6</sup> *Id.*, para. 2.

<sup>7</sup> *Id.*, para. 7(b); Annex B, para. 3.

to the JCPOA, Resolution 2231 also lifted previous Security Council resolutions that had imposed sanctions on Iran.<sup>8</sup>

Over the course of 2017, Trump continued to waive U.S. sanctions pursuant to the JCPOA but expressed ongoing dissatisfaction with its terms and more generally with Iranian behavior. One concern involved the sunset provisions of the JCPOA, which included time limits on certain Iranian commitments to reduce its uranium enrichment.<sup>9</sup> Another concern related to Iran's ballistic missile testing. Notwithstanding the provision in Resolution 2231 calling upon it to do otherwise, Iran continued to engage in testing, including by launching a medium range ballistic missile test within a few days of Trump's inauguration.<sup>10</sup> More generally, Trump signaled disapproval of the JCPOA's narrow focus on Iran's nuclear program, noting that "the Iranian regime continues to fuel conflict, terror, and turmoil throughout the Middle East and beyond."<sup>11</sup> Starting in October 2017, President Trump declined to certify to Congress that Iran was taking "appropriate and proportionate" measures to end its nuclear program—a decision that, under the 2015 Iran Nuclear Review Act, provided Congress with the option of reimposing sanctions on Iran through an expedited legislative procedure.<sup>12</sup>

When Trump decided to waive sanctions again on January 12, 2018, he announced that he would withdraw from the JCPOA unless a unified stance aimed at toughening it was reached with European allies before the next waiver deadline on May 12, 2018:

Despite my strong inclination, I have not yet withdrawn the United States from the Iran nuclear deal. Instead, I have outlined two possible paths forward: either fix the deal's disastrous flaws, or the United States will withdraw.

...

In 2015, the Obama Administration foolishly traded away strong multilateral sanctions to get its weak nuclear deal. By contrast, my Administration has engaged with key European allies in seeking to secure a new supplemental agreement that would impose new multilateral sanctions if Iran develops or tests long-range missiles, thwarts inspections, or makes progress toward a nuclear weapon—requirements that should have been in the nuclear deal in the first place. And, like the bill I expect from Congress, these provisions of a supplemental agreement must never expire.

<sup>8</sup> *Id.*, para. 7(a); see also Jean Galbraith, *Ending Security Council Resolutions*, 109 AJIL 806, 808–09 (2015) (detailing how Resolution 2231 contains a snapback provision that effectively allows any single permanent member of the Security Council to reimpose the prior Security Council sanctions under certain conditions).

<sup>9</sup> See JCPOA, *supra* note 4, at para. 15.

<sup>10</sup> Idrees Ali, *Iran Tested Medium-Range Ballistic Missile: U.S. Official*, REUTERS (Jan. 30, 2017), at <https://www.reuters.com/article/us-usa-iran-missiles-idUSKBN15E2EZ>; see also Kristina Daugirdas & Julian Davis Mortenson, *Contemporary Practice of the United States*, 111 AJIL 776, 777 (2017) (providing further details). In response, the Trump administration imposed non-nuclear sanctions on certain Iranian individuals and entities. *Id.*

<sup>11</sup> Donald J. Trump, Remarks on United States Strategy Towards Iran, 2017 DAILY COMP. PRES. DOC. 749 (Oct. 13, 2017).

<sup>12</sup> Jean Galbraith, *Contemporary Practice of the United States*, 112 AJIL 120, 125 (2017) (discussing the certification process and Trump's decision to withhold certification). In January and April of 2018, Trump again refused to make a certification to Congress. KENNETH KATZMAN, PAUL K. KERR & VALERIE HEITSHUSEN, CONG. RESEARCH SERV., U.S. DECISION TO CEASE IMPLEMENTING THE IRAN NUCLEAR AGREEMENT 7 (2018), available at <https://fas.org/sgp/crs/nuke/R44942.pdf>. Congress did not make use of the expedited procedures set forth in the Iran Nuclear Review Act, thus leaving it to the president to decide whether or not to continue to waive sanctions.

I also call on all our allies to take stronger steps with us to confront Iran's other malign activities. Among other actions, our allies should cut off funding to the Islamic Revolutionary Guard Corps, its militant proxies, and anyone else who contributes to Iran's support for terrorism. They should designate Hezbollah—in its entirety—as a terrorist organization. They should join us in constraining Iran's missile development and stopping its proliferation of missiles, especially to Yemen. They should join us in countering Iran's cyber threats. They should help us deter Iran's aggression against international shipping. They should pressure the Iranian regime to stop violating its citizens' rights. And they should not do business with groups that enrich Iran's dictatorship or fund the Revolutionary Guard and its terrorist proxies.

Today, I am waiving the application of certain nuclear sanctions, but only in order to secure our European allies' agreement to fix the terrible flaws of the Iran nuclear deal. This is a last chance. In the absence of such an agreement, the United States will not again waive sanctions in order to stay in the Iran nuclear deal. And if at any time I judge that such an agreement is not within reach, I will withdraw from the deal immediately.<sup>13</sup>

In response to Trump's warning, European allies engaged in dialogue regarding his concerns and sought to discourage him from withdrawing from the JCPOA. In February during a visit with German Chancellor Angela Merkel, British Prime Minister Theresa May stated that they were both “ready to take further appropriate measures” regarding Trump's concerns about Iranian behavior.<sup>14</sup> By the end of March, U.S. officials had met three times with officials from the United Kingdom, Germany, and France (the E3) in an unsuccessful attempt to negotiate the supplemental agreement called for by Trump.<sup>15</sup> These meetings focused on “the sunset of restrictions on Iran's nuclear program, the omission of [intercontinental ballistic missiles] from the original Iran nuclear agreement, and a stronger inspections regime.”<sup>16</sup> Near the end of April, President Emmanuel Macron of France visited the United States and indicated his support in principle for a supplemental agreement, while disagreeing with Trump that withdrawal was an appropriate alternative. He stated, “I believe we can both combine our common views and our differences, because we are not in a vacuum. I always said we should not tear apart the JCPOA and have nothing else[,] . . . that would not be the good solution.”<sup>17</sup>

<sup>13</sup> Trump Statement, *supra* note 3. Trump also outlined his support for possible congressional legislation relating to Iran's nuclear program if this legislation contained four specified components. *Id.*

<sup>14</sup> Karen DeYoung, *Europeans Look for a Way to Preserve Nuclear Deal While Punishing Iran and Satisfying Trump*, WASH. POST (Feb. 23, 2018), at [https://www.washingtonpost.com/world/national-security/europeans-look-for-a-way-to-preserve-nuclear-deal-while-punishing-iran-and-satisfying-trump/2018/02/22/2bc89b8e-129f-11e8-9065-e55346f6de81\\_story.html?utm\\_term=.803f70b0c8a0](https://www.washingtonpost.com/world/national-security/europeans-look-for-a-way-to-preserve-nuclear-deal-while-punishing-iran-and-satisfying-trump/2018/02/22/2bc89b8e-129f-11e8-9065-e55346f6de81_story.html?utm_term=.803f70b0c8a0).

<sup>15</sup> See U.S. Dep't of State Press Release, Briefing on the Joint Comprehensive Plan of Action Joint Commission and E3 Meetings in Vienna and Berlin (Mar. 21, 2018), at <https://www.state.gov/r/pa/prs/ps/2018/03/279441.htm> [<https://perma.cc/2SKU-YPU4>].

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

<sup>17</sup> White House Press Release, Remarks by President Trump and President Macron of France in Joint Press Conference (Apr. 24, 2018), at <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-president-macron-france-joint-press-conference> [<https://perma.cc/QR3H-FHEU>].

On May 8, 2018, Trump announced that the United States would end its participation in the JCPOA and reimpose the lifted sanctions:

In theory, the so-called “Iran deal” was supposed to protect the United States and our allies from the lunacy of an Iranian nuclear bomb . . . .

. . .

The agreement was so poorly negotiated that even if Iran fully complies, the regime can still be on the verge of a nuclear breakout in just a short period of time. The deal’s sunset provisions are totally unacceptable . . . .

Making matters worse, the deal’s inspection provisions lack adequate mechanisms to prevent, detect, and punish cheating, and don’t even have the unqualified right to inspect many important locations, including military facilities.

Not only does the deal fail to halt Iran’s nuclear ambitions, but it also fails to address the regime’s development of ballistic missiles that could deliver nuclear warheads.

. . .

Therefore, I am announcing today that the United States will withdraw from the Iran nuclear deal.

. . .

As we exit the Iran deal, we will be working with our allies to find a real, comprehensive, and lasting solution to the Iranian nuclear threat. . . . In the meantime, powerful sanctions will go into full effect. If the regime continues its nuclear aspirations, it will have bigger problems than it has ever had before.

. . .

Iran’s leaders will naturally say that they refuse to negotiate a new deal; they refuse. And that’s fine. I’d probably say the same thing if I was in their position. But the fact is, they are going to want to make a new and lasting deal, one that benefits all of Iran and the Iranian people. When they do, I am ready, willing, and able.<sup>18</sup>

In conjunction with his remarks, Trump signed a presidential memorandum with five main sections explaining the decision to withdraw from the JCPOA and providing directions to administration officials for reimposing sanctions:

Section 1. Policy. It is the policy of the United States that Iran be denied a nuclear weapon and intercontinental ballistic missiles; that Iran’s network and campaign of regional aggression be neutralized; to disrupt, degrade, or deny the Islamic Revolutionary Guards Corps and its surrogates access to the resources that sustain their destabilizing activities; and to counter Iran’s aggressive development of missiles and other asymmetric and conventional weapons capabilities. . . .

<sup>18</sup> Donald J. Trump, Remarks on the Joint Comprehensive Plan of Action to Prevent Iran from Obtaining a Nuclear Weapon and an Exchange with Reporters, 2018 DAILY COMP. PRES. DOC. 310 (May 8, 2018) [hereinafter Trump Remarks].

Sec. 2. Ending United States Participation in the JCPOA. The Secretary of State shall, in consultation with the Secretary of the Treasury and the Secretary of Energy, take all appropriate steps to cease the participation of the United States in the JCPOA.

Sec. 3. Restoring United States Sanctions. The Secretary of State and the Secretary of the Treasury shall immediately begin taking steps to re-impose all United States sanctions lifted or waived in connection with the JCPOA . . . .

Sec. 4. Preparing for Regional Contingencies. The Secretary of Defense and heads of any other relevant agencies shall prepare to meet, swiftly and decisively, all possible modes of Iranian aggression against the United States, our allies, and our partners. . . .

Sec. 5. Monitoring Iran's Nuclear Conduct and Consultation with Allies and Partners. Agencies shall take appropriate steps to enable the United States to continue to monitor Iran's nuclear conduct. I am open to consultations with allies and partners on future international agreements to counter the full range of Iran's threats . . . .<sup>19</sup>

Trump's memorandum provided the Secretary of State and Secretary of the Treasury with specific guidance for the reimposition of sanctions within 180 days from the date of his memorandum.<sup>20</sup> Trump directed the reimposition of sanctions under the National Defense Authorization Act for Fiscal Year 2012 and the Iran Threat Reduction and Syria Human Rights Act of 2012.<sup>21</sup> Trump also instructed the departments to reimpose sanctions lifted by Executive Order 13716, which had been issued by President Obama in implementing the JCPOA.<sup>22</sup> The sanctions resulting from Trump's memorandum are a robust combination of primary and secondary sanctions on domestic and foreign entities, including companies that do business with various Iranian industries, including energy, and on banks that do business with the Central Bank of Iran.<sup>23</sup>

In a press briefing, an official from the State Department explained how the United States would begin to implement Trump's order:

[T]he sanctions reimposition that the President talked about is going to come in two phases. There's going to be one period for wind down that lasts about—that lasts 90 days, and one period of wind down that lasts six months. The six-month wind down—wind downs are, by the way, pretty standard across sanctions programs. . . .

<sup>19</sup> Presidential Memorandum, *Ceasing U.S. Participation in the JCPOA and Taking Additional Action to Counter Iran's Malign Influence and Deny Iran All Paths to a Nuclear Weapon* (May 8, 2018), at <https://www.whitehouse.gov/presidential-actions/ceasing-u-s-participation-jcpoa-taking-additional-action-counter-irans-malign-influence-deny-iran-paths-nuclear-weapon> [<https://perma.cc/5MTH-GG9F>] [hereinafter Trump Memorandum]. While the memorandum also noted that “[i]n 2016, Iran also twice violated the JCPOA's heavy water stockpile limits,” neither it nor Trump's remarks identified any Iranian non-compliance with the JCPOA since the beginning of the Trump administration. *See id.*; Trump Remarks, *supra* note 18.

<sup>20</sup> Trump Memorandum, *supra* note 19.

<sup>21</sup> *Id.*

<sup>22</sup> Exec. Order No. 13,716, 81 Fed. Reg. 3693, 3693–94 (Jan. 16, 2016).

<sup>23</sup> For an overview, see U.S. Dep't of Treasury, *Frequently Asked Questions Regarding the Re-imposition of Sanctions Pursuant to May 8, 2018 National Security Presidential Memorandum Relating to the Joint Comprehensive Plan of Action (JCPOA)* (May 8, 2018), available at [https://www.treasury.gov/resource-center/sanctions/Programs/Documents/jcpoa\\_winddown\\_faqs.pdf](https://www.treasury.gov/resource-center/sanctions/Programs/Documents/jcpoa_winddown_faqs.pdf).

In this case, we're providing a six-month wind down for energy-related sanctions. So that's oil, petroleum, petrochemicals, and then all of the ancillary sanctions that are associated with that. So, for example, banking; sanctions on the CBI in particular, because the Central Bank of Iran is involved in Iran's export of oil and the receipt of revenues. Shipping, shipbuilding, ports—all of those sanctions that are related to both the energy sector and then the banking and the shipping or transportation of that energy will all have a six-month wind down. Everything else is going to have a 90-day wind down. So that's—the architecture of the Iranian sanctions program was quite complex, but everything else includes things like dealing in the rial, providing metal—precious metals and gold to the Iranian regime, providing U.S. banknotes.<sup>24</sup>

When questioned about secondary sanctions, the official confirmed that the administration wants to reimpose sanctions on foreign entities that do business with Iran in a way that was similar to the United States' pre-JCPOA structure.<sup>25</sup> The official acknowledged uncertainty as to how European countries would respond to the secondary sanctions, explaining that prior to Trump's withdrawal they had been “focused on negotiating a supplemental agreement, so we did not—we did not talk about a Plan B.”<sup>26</sup>

The European Union issued a press release “deeply regretting” the announced U.S. withdrawal.<sup>27</sup> It emphasized that “[a]s long as Iran continues to implement its nuclear related commitments, as it has been doing so far . . . the EU will remain committed to the continued full and effective implementation of the nuclear deal.”<sup>28</sup> Similarly, Macron tweeted that “France, Germany, and the UK regret the U.S. decision to leave the JCPOA. The nuclear non-proliferation regime is at stake.”<sup>29</sup> He also noted that France will continue to “work collectively on a broader framework, covering nuclear activity, the post-2025 period, ballistic activity, and stability in the Middle-East, notably Syria, Yemen, and Iraq.”<sup>30</sup> UN Secretary-General António Guterres was “deeply concerned” by Trump's announcement and called on other JCPOA participants “to abide fully by their respective commitments under the JCPOA,” which he described as “a major achievement in nuclear non-proliferation and diplomacy.”<sup>31</sup>

<sup>24</sup> U.S. Dep't of State Press Release, Background Briefing on President Trump's Decision To Withdraw From the JCPOA (May 8, 2018), at <https://www.state.gov/r/pa/prs/ps/2018/05/281959.htm> [<https://perma.cc/B2CE-4P63>].

<sup>25</sup> *Id.* (expressing the expectation that few if any penalties would end up being imposed because foreign entities would choose not to violate these sanctions).

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

<sup>27</sup> Council of the European Union Press Release, Declaration by the High Representative on behalf of the EU Following US President Trump's Announcement on the Iran Nuclear Deal (JCPOA) (May 9, 2018), at <http://www.consilium.europa.eu/en/press/press-releases/2018/05/09/declaration-by-the-high-representative-on-behalf-of-the-eu-following-us-president-trump-s-announcement-on-the-iran-nuclear-deal-jcpoa>.

<sup>28</sup> *Id.*

<sup>29</sup> Emmanuel Macron (@EmmanuelMacron), TWITTER (May 8, 2018, 11:29 AM), at <https://twitter.com/EmmanuelMacron/status/993920765060878336>.

<sup>30</sup> Emmanuel Macron (@EmmanuelMacron), TWITTER (May 8, 2018, 11:25 AM), at <https://twitter.com/EmmanuelMacron/status/993919803835539463>.

<sup>31</sup> United Nations Press Release, Secretary-General ‘Deeply Concerned’ by United States Announcement on Withdrawing from Iran Nuclear Agreement, Calls on Other Parties to Fulfil Commitments (May 8, 2018), at <https://www.un.org/press/en/2018/sgsmn19022.doc.htm>.

In Tehran, rallies were held against Trump's decision, and the Iranian government issued a statement denouncing the "new extremist administration."<sup>32</sup> The Iranian foreign minister stated that Trump's decision and memorandum were "in clear non-compliance with Security Council Resolution 2231" and "constitute a complete disregard for international law and the United Nations Charter, undermine the principle of peaceful settlement of disputes, endanger multilateralism and its institutions, . . . and encourage intransigence and illegality."<sup>33</sup> The Russian Foreign Ministry was "deeply disappointed" by the decision to withdraw and indicated it may be a possible violation of international law.<sup>34</sup>

Although most reactions to Trump's decision were made in regret or in stark opposition, some foreign officials offered their support. Prime Minister Benjamin Netanyahu of Israel and Khalid bin Salman, Saudi Arabia's ambassador to the United States, both made statements backing Trump's decision to withdraw from the JCPOA and reimpose sanctions.<sup>35</sup>

Leaders of E3 issued a joint statement pointing to Resolution 2231 as a binding framework for addressing the Iranian nuclear program:

Together, we emphasise our continuing commitment to the JCPOA. This agreement remains important for our shared security. We recall that the JCPOA was unanimously endorsed by the UN Security Council in resolution 2231. This resolution remains the binding international legal framework for the resolution of the dispute about the Iranian nuclear programme. . . .<sup>36</sup>

Among scholars and practitioners, there is some debate over whether the language in Resolution 2231 endorsing the JCPOA and calling upon member states to support the JCPOA's implementation creates a legally binding obligation.<sup>37</sup> The unsigned JCPOA is not itself a legally binding agreement, or at least this was the strong assumption of its U.S.

<sup>32</sup> Thomas Erdbrink & Rick Gladstone, *Iran Rallies Against U.S. and Warns Europe Over Endangered Nuclear Deal*, N.Y. TIMES (May 11, 2018), at [https://www.nytimes.com/2018/05/11/world/middleeast/iran-nuclear-deal.html?rref=collection%2Fsectioncollection%2Fmiddleeast&action=click&contentCollection=middleeast&region=stream&module=stream\\_unit&version=latest&contentPlacement=20&pgtype=section](https://www.nytimes.com/2018/05/11/world/middleeast/iran-nuclear-deal.html?rref=collection%2Fsectioncollection%2Fmiddleeast&action=click&contentCollection=middleeast&region=stream&module=stream_unit&version=latest&contentPlacement=20&pgtype=section).

<sup>33</sup> Letter from M. Javad Zarif, Iranian Foreign Minister, to António Guterres, UN Secretary General (May 10, 2018), at <http://en.mfa.ir/index.aspx?fkeyid=&siteid=3&pageid=36409&newsview=514551>.

<sup>34</sup> *Russian FM: Moscow Regrets US Decision to Withdraw from Iran Nuclear Deal*, SPUTNIK (May 9, 2018), at <https://sputniknews.com/russia/201805091064271245-russia-iran-nuclear-deal-usa>.

<sup>35</sup> *Trump Withdrew from the Iran Deal. Here's How Republicans, Democrats and the World Reacted*, N.Y. TIMES (May 8, 2018), at [https://www.nytimes.com/2018/05/08/world/middleeast/trump-iran-deal-republicans-democrats-world-reactions.html?rref=collection%2Fsectioncollection%2Fmiddleeast&action=click&contentCollection=middleeast&region=stream&module=stream\\_unit&version=late](https://www.nytimes.com/2018/05/08/world/middleeast/trump-iran-deal-republicans-democrats-world-reactions.html?rref=collection%2Fsectioncollection%2Fmiddleeast&action=click&contentCollection=middleeast&region=stream&module=stream_unit&version=late). Some initial reactions from leading members of Congress were mixed, splitting largely on partisan lines. See *id.*

<sup>36</sup> United Kingdom Press Release, Joint Statement from Prime Minister May, Chancellor Merkel and President Macron Following President Trump's Statement on Iran (May 8, 2018), at <https://www.gov.uk/government/news/joint-statement-from-prime-minister-may-chancellor-merkel-and-president-macron-following-president-trumps-statement-on-iran>.

<sup>37</sup> Compare Katayoun Hosseinnejad & Pouria Askary, *The International Community and the Challenge to the Rule of Law: The Future of Iran Nuclear Deal*, OPINIO JURIS (May 21, 2018), at <http://opiniojuris.org/2018/05/21/the-international-community-and-the-challenge-to-the-rule-of-law-the-future-of-iran-nuclear-deal> (arguing that it is a binding obligation) with John Bellinger, *The New UNSCR on Iran: Does It Bind the United States (and Future Presidents)?*, LAWFARE (July 18, 2015), at <https://www.lawfareblog.com/new-unscr-iran-does-it-bind-united-states-and-future-presidents> (arguing that it is not a binding obligation).

negotiators.<sup>38</sup> The Security Council Resolution is binding to the extent that it gives a legally binding directive and triggers the obligations of member states under the UN Charter.<sup>39</sup> Resolution 2231 simply “calls upon” states to implement the JCPOA<sup>40</sup>—it does not, for example, “decide” that they shall do so. But in its Namibia Advisory Opinion, the International Court of Justice found, through a case-specific analysis, that a provision of a resolution that “calls upon” states to take various actions was binding.<sup>41</sup> Notably, a similar analysis could be undertaken with respect to the provision of Resolution 2231 in which Iran is “called upon” to refrain from “any activity related to ballistic missiles designed to be capable of delivering nuclear weapons.”<sup>42</sup>

In the wake of Trump’s decision to withdraw, Secretary of State Mike Pompeo announced that the administration will apply “unprecedented financial pressure on the Iranian regime.”<sup>43</sup> Pompeo also outlined twelve demands that the United States has for Iran in any negotiations for a new agreement.<sup>44</sup> These include that Iran must

permanently and verifiably abandon [military dimensions of its nuclear program,] . . . stop enrichment[,] . . . provide the IAEA with unqualified access to all sites throughout the entire country[,] . . . end proliferation of ballistic missiles[,] . . . end support to Middle East terrorist groups[,] . . . [and] withdraw all forces under Iranian command throughout the entirety of Syria.<sup>45</sup>

When asked how he would work with allies with respect to these objectives, he stated that “[t]he United States intends to work hard at the diplomatic piece of working alongside all of our partners. We focus on the Europeans, but there are scores of countries around the world who share our concerns and are equally threatened by the Iranian regime.”<sup>46</sup>

The European Commission recently initiated the activation of its 1996 blocking statute, which “forbids EU persons from complying with US extraterritorial sanctions, allows companies to recover damages arising from such sanctions from the person causing them, and nullifies the effect in the EU of any foreign court judgements based on them.”<sup>47</sup> The commission seeks to have the statute activated by August 6, 2018 and thus before the U.S. sanctions

<sup>38</sup> Matthew Weybrecht, *State Department Affirms That Iran Deal Is Only a Political Commitment*, LAWFARE (Nov. 28, 2015), at <https://www.lawfareblog.com/state-department-affirms-iran-deal-only-political-commitment>.

<sup>39</sup> See UN Charter Art. 25 (“The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.”).

<sup>40</sup> SC Res. 2231, *supra* note 5, at para. 2.

<sup>41</sup> Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 ICJ Rep. 16, 51–53 (June 21) (finding paragraph 5 of Resolution 276—which “calls upon all states” to refrain from certain dealings with South Africa—to bindingly give rise to an “obligation to accept and carry [it] out”).

<sup>42</sup> See SC Res. 2231, *supra* note 5, para. 7(b); Annex B, para. 3.

<sup>43</sup> Secretary of State Mike Pompeo, Remarks, After the Deal: A New Iran Strategy (May 21, 2018), at <https://www.state.gov/secretary/remarks/2018/05/282301.htm> [<https://perma.cc/3C7G-RE5J>].

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> European Commission Press Release, European Commission Acts to Protect the Interests of EU Companies Investing in Iran as Part of the EU’s Continued Commitment to the Joint Comprehensive Plan of Action (May 18, 2018), at [http://europa.eu/rapid/press-release\\_IP-18-3861\\_en.htm](http://europa.eu/rapid/press-release_IP-18-3861_en.htm).

take effect.<sup>48</sup> On May 24, the IAEA reported that Iran had again complied with limits on uranium enrichment, and, the next day, Iranian officials met in Vienna with officials from Britain, France, Germany, China, and Russia.<sup>49</sup> These countries reaffirmed to Iran their commitment to the deal, but an Iranian official told reporters that “[w]e are still complying but we have not decided whether . . . to stay in the deal or not.”<sup>50</sup>

*United States Bombs Syrian Government Facilities in Response to Chemical Weapons Use*  
doi:10.1017/ajil.2018.58

On April 13, 2018, President Trump ordered the launch of air strikes against Syria in response to the Syrian government’s apparent use of chemical weapons on civilians in the Syrian town of Douma a few days earlier.<sup>1</sup> The air strikes, which targeted several weapons-related facilities of the Syrian government,<sup>2</sup> were carried out in conjunction with the United Kingdom and France.<sup>3</sup>

In announcing the strikes, Trump stated in a televised address:

One year ago, [Assad] launched a savage chemical weapons attack against his own innocent people. The United States responded with 58 missile strikes that destroyed 20 percent of the Syrian Air Force.

Last Saturday, the [Assad] regime again deployed chemical weapons to slaughter innocent civilians—this time, in the town of Douma, near the Syrian capital of Damascus. This massacre was a significant escalation in a pattern of chemical weapons use by that very terrible regime.

...

The purpose of our actions tonight is to establish a strong deterrent against the production, spread, and use of chemical weapons. Establishing this deterrent is a vital national security interest of the United States. The combined American, British, and French response to these atrocities will integrate all instruments of our national power—military, economic, and diplomatic. We are prepared to sustain this response until the Syrian regime stops its use of prohibited chemical agents.

...

<sup>48</sup> *Id.*

<sup>49</sup> *Iran Seeks Assurances on Nuclear Deal After US Pullout*, N.Y. DAILY NEWS (May 25, 2018), at <http://www.nydailynews.com/news/wires/news/world/iran-seeks-assurances-nuclear-deal-pullout-article-1.4009017>.

<sup>50</sup> *Id.*

<sup>1</sup> Donald J. Trump, Remarks on United States Military Operations in Syria, 2018 DAILY COMP. PRES. DOC. 242 (Apr. 13, 2018) [hereinafter Trump Remarks].

<sup>2</sup> Donald J. Trump, Letter to Congressional Leaders on United States Military Operations in Syria, 2018 DAILY COMP. PRES. DOC. 243 (Apr. 15, 2018) [hereinafter Trump Letter].

<sup>3</sup> White House Press Release, *Joined by Allies, President Trump Takes Action to End Syria’s Chemical Weapons Attacks* (Apr. 14, 2018), at <https://www.whitehouse.gov/articles/joined-allies-president-trump-takes-action-end-syrias-chemical-weapons-attacks> [<https://perma.cc/7D2J-NWFG>].

In 2013, President Putin and his Government promised the world that they would guarantee the elimination of Syria's chemical weapons. [Assad's] recent attack—and today's response—are the direct result of Russia's failure to keep that promise. Russia must decide if it will continue down this dark path, or if it will join with civilized nations as a force for stability and peace. Hopefully, someday we'll get along with Russia, and maybe even Iran—but maybe not.

...

America does not seek an indefinite presence in Syria under no circumstances. As other nations step up their contributions, we look forward to the day when we can bring our warriors home. . . .<sup>4</sup>

In a press release issued the same day, the White House declared that while it had considered alternative explanations, it had assessed “with confidence” the Syrian government's responsibility for the chemical weapons attack on Douma.<sup>5</sup> Referencing photographs and video from “social media users, non-governmental organizations, and other open-source outlets” in Syria, it said that a “significant body of information” suggested that chlorine had been used in the attack, and that “additional information” indicated the use of the nerve agent sarin as well.<sup>6</sup> The White House also accused Syrian president Bashar al-Assad of carrying out collective punishment and executing the attack in a way calculated to inflict maximum suffering.<sup>7</sup>

The Trump administration blamed Russia for shielding Syria from accountability, saying in a press release issued by State Department spokesperson Heather Nauert that “Russia . . . ultimately bears responsibility for these brutal attacks.”<sup>8</sup> Nauert also accused Russia of “breach[ing] its commitments to the United Nations as a framework guarantor . . . [and] betray[ing] the Chemical Weapons Convention and UN Security Council Resolution 2118.”<sup>9</sup> By contrast, Russian Foreign Minister Sergey Lavrov said in an interview that the chemical weapons attack was “staged” as part of a “Russophobic campaign” and “did not involve any chemical weapons.”<sup>10</sup>

The United Kingdom and France, both of which participated in the air strikes, asserted that the air strikes complied with international law—the United Kingdom on a theory of

<sup>4</sup> Trump Remarks, *supra* note 1.

<sup>5</sup> White House Press Release, United States Government Assessment of the Assad Regime's Chemical Weapons Use (Apr. 13, 2018), at <https://www.whitehouse.gov/briefings-statements/united-states-government-assessment-assad-regimes-chemical-weapons-use> [<https://perma.cc/5EAK-DJMW>].

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

<sup>7</sup> *Id.*

<sup>8</sup> U.S. Dep't of State Press Release, On the Chemical Attack in Douma (Apr. 7, 2018), at <https://www.state.gov/r/pa/prs/ps/2018/04/280313.htm> [<https://perma.cc/56XJ-PRMV>].

<sup>9</sup> *Id.* Resolution 2118, adopted in September 2013 in the wake of a chemical weapons attack against civilians during the Syrian civil war, condemned the use of chemical weapons, banned Syria from using them, and welcomed an agreement reached between Russia, the United States, and Syria regarding the destruction of Syria's chemical weapons. SC Res. 2118 (Sept. 27, 2013); *see also* Kristina Daugirdas & Julian Davis Mortenson, Contemporary Practice of the United States, 108 AJIL 94, 95 (2014) (describing this resolution and its context).

<sup>10</sup> Russ. Fed. Foreign Ministry Press Release, Foreign Minister Sergey Lavrov's Interview With BBC HardTalk (Apr. 16, 2018), at [http://www.mid.ru/en/web/guest/organizacia-po-zapreseniu-himiceskogo-oruzia-/-/asset\\_publisher/km9HkaXMTium/content/id/3172318](http://www.mid.ru/en/web/guest/organizacia-po-zapreseniu-himiceskogo-oruzia-/-/asset_publisher/km9HkaXMTium/content/id/3172318).

“humanitarian intervention”<sup>11</sup> and France on less clearly specified grounds.<sup>12</sup> On the other hand, the United States has not offered a consistent or definitive international law justification for the air strikes.<sup>13</sup> Some states that did not participate in the strikes have expressed political support or “understanding” for the air strikes without discussing their legality, while others have taken stances that neither explicitly condemn nor condone the strikes.<sup>14</sup> Finally, some states, including Syria, Russia, China, and South Africa, have explicitly declared the air strikes to be illegal under international law.<sup>15</sup> For example, Russian president Vladimir Putin called the air strikes

[a]n act of aggression against a sovereign state that is on the frontline in the fight against terrorism [that] was committed without a mandate from the UN Security Council and in violation of the UN Charter and norms and principles of international law.<sup>16</sup>

Russia also introduced a Security Council resolution condemning the air strikes, which was supported by China and Bolivia.<sup>17</sup> Eight Security Council members, including the United States, United Kingdom, and France, opposed the resolution, while four countries abstained.<sup>18</sup>

Shortly after the strikes, Trump sent a letter to Congress regarding his decision to launch air strikes against Syria and his domestic legal justification for doing so. It reads:

At approximately 9:00 p.m. Eastern Daylight Time on April 13, 2018, at my direction, United States military forces, acting in concert with French and British military forces,

<sup>11</sup> Off. of the Brit. Prime Minister Press Release, Syria Action – UK Government Legal Position (Apr. 14, 2018), at <https://www.gov.uk/government/publications/syria-action-uk-government-legal-position/syria-action-uk-government-legal-position>.

<sup>12</sup> See Permanent Mission of France to the UN Press Release, Syria: Silence is No Longer an Option (Apr. 14, 2018), at <https://onu.delegfrance.org/Syria-silence-is-no-longer-an-option> (describing the strikes as “lawful” and referencing, among other things, the “goals and values proclaimed in the very first lines of the UN Charter”).

<sup>13</sup> Justin Florence, *What’s the Legal Basis for the Syria Strikes? The Administration Must Acknowledge Limits on Its Power to Start a War*, JUST SECURITY (May 8, 2017), at <https://lawfareblog.com/whats-legal-basis-syria-strikes-administration-must-acknowledge-limits-its-power-start-war> (commenting that “Members of the Administration have offered a plethora of inconsistent rationales for the [air] strikes”); cf. Alonso Gurmendi Dunkelberg, Rebecca Ingber, Priya Pillai & Elvina Pothelet, *Mapping States’ Reactions to the Syria Strikes of April 2018*, JUST SECURITY (Apr. 22, 2018), at <https://www.justsecurity.org/55157/mapping-states-reactions-syria-strikes-april-2018> (listing possible claims of legality by the United States and more generally surveying state reactions to the air strikes).

<sup>14</sup> Dunkelberg, Ingber, Pillai & Pothelet, *supra* note 13; see also Alonso Gurmendi Dunkelberg, Rebecca Ingber, Priya Pillai & Elvina Pothelet, UPDATE: Mapping States’ Reactions to the Syria Strikes of April 2018, JUST SECURITY (May 7, 2018), at <https://www.justsecurity.org/55790/update-mapping-states-reactions-syria-strikes-april-2018> (updating their prior survey to include an additional twenty-three states and dividing the cumulative responses into ten categories).

<sup>15</sup> Dunkelberg, Ingber, Pillai & Pothelet, *supra* note 13. For scholarly analysis on the legality of the air strikes, see, e.g., Ryan Goodman, *What Do Top Legal Experts Say About the Syria Strikes?*, JUST SECURITY (Apr. 7, 2017), at <https://www.justsecurity.org/39712/top-legal-experts-syria-strikes>; Jack Goldsmith & Oona Hathaway, *Bad Legal Arguments for the Syria Strikes*, LAWFARE (Apr. 14, 2018), <https://lawfareblog.com/bad-legal-arguments-syria-air-strikes> (addressing legal theories that have been proposed to justify the legality of the air strikes and commenting that “there is no apparent domestic or international legal authority for the strikes”).

<sup>16</sup> President of Russia Press Release, Statement by President of Russia Vladimir Putin (Apr. 14, 2018), at <http://en.kremlin.ru/events/president/news/57257>.

<sup>17</sup> Sewell Chan, *U.N. Security Council Rejects Russian Resolution Condemning Syrian Strikes*, N.Y. TIMES (Apr. 14, 2018), at <https://www.nytimes.com/2018/04/14/world/middleeast/un-security-council-syria-airstrikes.html>.

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

struck Syrian military chemical weapons-related facilities. The targets of the combined operation were a scientific research center installation, a storage facility, and a bunker. I directed this action in response to the Syrian government's continued and unlawful use of chemical weapons, including in the horrific attack in Duma, Syria, on April 7 that injured or killed numerous innocent civilians. The purpose of this military action was to degrade the Syrian military's ability to conduct further chemical weapons attacks and to dissuade the Syrian government from using or proliferating chemical weapons.

I acted pursuant to my constitutional authority to conduct foreign relations and as Commander in Chief and Chief Executive and in the vital national security and foreign policy interests of the United States to promote the stability of the region, to deter the use and proliferation of chemical weapons, and to avert a worsening of the region's current humanitarian catastrophe. The United States will take additional action, as necessary and appropriate, to further its important national interests.

I am providing this report as part of my efforts to keep the Congress fully informed, consistent with the War Powers Resolution (Public Law 93-148). I appreciate the support of the Congress in this action.<sup>19</sup>

Trump had sent a similar report to Congress in April 2017 after ordering a prior round of air strikes against a Syrian government airfield in response to the apparent use of chemical weapons by Syria.<sup>20</sup>

On May 31, 2018, the Office of Legal Counsel at the Department of Justice issued a twenty-two page opinion defending the legality of the strikes as a matter of domestic law, although not discussing the legality of the strikes under international law.<sup>21</sup> Relying on "the legal opinions of executive advisers and the still weightier precedents of history," the memorandum determined that "the President, as Commander in Chief and Chief Executive, has the constitutional authority to deploy the military to protect American persons and interests without seeking prior authorization from Congress."<sup>22</sup> The memorandum identified four interests that the Office of Legal Counsel had previously recognized as appropriate justifications: "the protection of U.S. persons and property"; "assistance to allies"; "support for the United Nations"; and "promoting regional stability."<sup>23</sup> The memorandum continued:

<sup>19</sup> Trump Letter, *supra* note 2.

<sup>20</sup> Donald J. Trump, Letter to Congressional Leaders on United States Military Operations in Syria, 2017 DAILY COMP. PRES. DOC. 244 (Apr. 8, 2017). A non-profit organization has filed a FOIA lawsuit against the Trump administration, seeking to obtain documents regarding its legal justifications for these April 2017 air strikes. See Chris Mirasola, *Summary: Lawsuit to Release the Legal Justification of Syria Airstrikes*, JUST SECURITY (Feb. 14, 2018), at <https://www.lawfareblog.com/summary-lawsuit-release-legal-justification-syria-airstrikes>; see also Kristina Daugirdas & Julian Davis Mortenson, *Contemporary Practice of the United States*, 111 AJIL 781 (2017) (discussing these strikes and some issues related to their legality).

<sup>21</sup> April 2018 Airstrikes Against Syrian Chemical-Weapons Facilities, Memorandum Opinion of May 31, 2018 (Memorandum from Steven A. Engel, Assistant Attorney General, Office of Legal Counsel), available at <https://www.justice.gov/olc/opinion/file/1067551/download>. The opinion indicates that legal advice to this effect was given before the strikes took place. *Id.* at 1 (noting that "[t]his memorandum explains the bases for our [earlier] conclusion").

<sup>22</sup> *Id.* at 3.

<sup>23</sup> *Id.* at 10–11.

In recent years, we have also identified the U.S. interest in mitigating humanitarian disasters. . . . With respect to Syria, in April 2017, the President identified the U.S. interest in preventing the use and proliferation of chemical weapons . . . .

The President identified three interests in support of the April 2018 Syria strikes: the promotion of regional stability, the prevention of a worsening of the region's humanitarian catastrophe, and the deterrence of the use and proliferation of chemical weapons. Prior to the attack, we advised that the President could reasonably rely on these national interests to authorize air strikes against particular facilities associated with Syria's chemical-weapons program without congressional authorization.<sup>24</sup>

The opinion also addressed "whether the President could expect the Syria operations to rise to the level of a war requiring congressional authorization."<sup>25</sup> After reviewing prior precedents, it concluded that "[T]he proposed Syrian operation, in its nature, scope, and duration, fell far short of the kinds of engagements approved by prior Presidents under Article II."<sup>26</sup> In reaching this conclusion, the opinion noted the absence of ground troops, the narrow focus of the mission, and its short duration. It added:

Standing on its own, the attack on three Syrian chemical-weapons facilities was not the kind of "prolonged and substantial military engagement" that would amount to war. . . . We did not, however, measure the engagement based solely upon the contours of the first strike. Rather, in evaluating the expected scope of hostilities, we also considered the risk that an initial strike could escalate into a broader conflict against Syria or its allies, such as Russia or Iran. . . .

We were advised that escalation was unlikely (and reviewed materials supporting that judgment), and we took note of several measures that had been taken to reduce the risk of escalation by Syria or Russia. . . . Given the absence of ground troops, the limited mission and time frame, and the efforts to avoid escalation, the anticipated nature, scope, and duration of these air strikes did not rise to the level of a 'war' for constitutional purposes.<sup>27</sup>

The April 2018 air strikes came at a time when the Trump administration was considering scaling back its military presence in Syria. More specifically, Trump has signaled his interest in withdrawing U.S. troops after all of the territory held by ISIS has been reclaimed and has called upon the United States' regional Arab allies to assume responsibility for post-war stabilization and reconstruction efforts.<sup>28</sup> If such an approach comes to be implemented, it

<sup>24</sup> *Id.* at 11–12; *see also id.* at 15 (noting that "[i]n some [prior] cases, humanitarian concerns have been a significant, or even the primary, interest served by U.S. military operations").

<sup>25</sup> *Id.* at 18; *see also id.* at 9 (citing prior precedents in observing that congressional authorization may be required for a military engagement that rises to the level of a war).

<sup>26</sup> *Id.* at 20.

<sup>27</sup> *Id.* at 21–22.

<sup>28</sup> Karen DeYoung & Shane Harris, *Trump Instructs Military to Begin Planning for Withdrawal from Syria*, WASH. POST (Apr. 4, 2018), at [https://www.washingtonpost.com/world/national-security/trump-instructs-military-to-begin-planning-for-withdrawal-from-syria/2018/04/04/1039f420-3811-11e8-8fd2-49fe3c675a89\\_story.html?noredirect=on&utm\\_term=.0281cde6d0c0](https://www.washingtonpost.com/world/national-security/trump-instructs-military-to-begin-planning-for-withdrawal-from-syria/2018/04/04/1039f420-3811-11e8-8fd2-49fe3c675a89_story.html?noredirect=on&utm_term=.0281cde6d0c0).

would also reduce the U.S. role in supporting non-ISIS rebel groups engaged in an ongoing conflict with the Russian-backed Syrian government.<sup>29</sup>

In the meantime, both Congress and the judicial branch are considering issues related to the domestic legal authority of the executive branch's campaign against ISIS. Members of Congress have introduced various bills to explicitly authorize the use of military force against ISIS and other specified terrorist groups, while simultaneously winding down or eliminating earlier authorizations from 2001 and 2002 that were aimed at responding, respectively, to the September 11, 2001 attack and the threat posed by the Saddam Hussein regime in Iraq.<sup>30</sup> In the judicial branch, at least two ongoing cases challenge the executive branch's current domestic legal authority for its military campaign against ISIS. One of these cases, *Smith v. Trump* (formerly *Smith v. Obama*) was brought by an Army captain; he lost on jurisdictional grounds in the federal district court and his case is presently on appeal in the D.C. Circuit.<sup>31</sup> In the other case, *Doe v. Mattis*, an American citizen who was captured in Syria, allegedly while fighting for ISIS, is challenging the legality of his detention, which in turn may depend upon the legality of the conflict against ISIS as a matter of U.S. domestic law.<sup>32</sup> He is also challenging an attempt by the United States government to transfer him to a third country.<sup>33</sup>

<sup>29</sup> Karen DeYoung, *Lawmakers Worry About Securing U.S. Goals in Syria as Trump Looks for the Exit*, WASH. POST (Apr. 18, 2018), at [https://www.washingtonpost.com/world/national-security/lawmakers-worry-about-securing-us-goals-in-syria-as-trump-looks-for-the-exit/2018/04/18/96dfc52a-4335-11e8-ad8f-27a8c409298b\\_story.html?noredirect=on&utm\\_term=.a95ca5aa9c6f](https://www.washingtonpost.com/world/national-security/lawmakers-worry-about-securing-us-goals-in-syria-as-trump-looks-for-the-exit/2018/04/18/96dfc52a-4335-11e8-ad8f-27a8c409298b_story.html?noredirect=on&utm_term=.a95ca5aa9c6f).

<sup>30</sup> The most prominent of these is a bipartisan bill, introduced by Senators Corker and Kaine. Authorization for Use of Military Force of 2018, at § 3(a), SJ Res. 59, 115th Cong. (2018). For discussion of another bill, see Heather Brandon-Smith, *Senator Merkley's Smart New Alternative AUMF Proposal*, JUST SECURITY (May 24, 2018), at <https://www.justsecurity.org/56987/senator-merkleys-smart-alternative-aumf-proposal>.

<sup>31</sup> For an overview, see Sabrina McCubbin, *Smith v. Trump: AUMF Challenge Pretrial Motion Summaries*, LAWFARE (Oct. 23, 2017), at <https://www.lawfareblog.com/smith-v-trump-aumf-challenge-pretrial-motion-summaries>. The case was argued in October 2017 at the D.C. Circuit, but, as of May 2018, the court had not issued its decision.

<sup>32</sup> For an analysis on the legal issues, see Robert Chesney, *A Primer on the Legal Dispute in Doe v. Mattis*, LAWFARE (Mar. 9, 2018), at <https://www.lawfareblog.com/primer-legal-dispute-doe-v-mattis>.

<sup>33</sup> See *Doe v. Mattis*, 889 F.3d 745 (D.C. Cir. 2018) (holding that in the absence of an applicable statute or treaty, the United States could only transfer *Doe* as an enemy combatant if there is "legal authority for the Executive to wage war against the enemy" and there is "an opportunity for the citizen to contest the factual determination that he is an enemy combatant fighting on behalf of that enemy"). The D.C. Circuit issued this decision in May 2018 and it remains to be seen whether the United States will seek review of it.