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# Contemporary Practice of the United States Relating to International Law (113:1 Am J Int'l L)

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

EDITED BY JEAN GALBRAITH\*

***In this section:***

- Trump Administration Announces Withdrawal from Four International Agreements
- Congress Passes Legislation Implementing the Marrakesh Treaty
- Palestine Brings a Case Against the United States in the International Court of Justice at a Fraught Time for U.S.-Palestinian Relations
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- Congress Signals Concern Over U.S. Role in Aiding Saudi Arabia's Activities in Yemen
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- Iran Initiates Suit Against the United States in the International Court of Justice, While Sanctions Take Effect

\* Kristen DeWilde, Emily Kyle, Patricia Liverpool, Sabrina Ruchelli, Jenna Smith, and Brian Yeh contributed to the preparation of this section.

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

*Trump Administration Announces Withdrawal from Four International Agreements*

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In October of 2018, the Trump administration announced that the United States would withdraw from four international agreements. On October 3, 2018, Secretary of State Mike Pompeo announced that the United States would withdraw from the Treaty of Amity, Economic Relations, and Consular Rights with Iran. Later that day, National Security Advisor John Bolton announced that the United States was also withdrawing from the Optional Protocol to the 1961 Vienna Convention on Diplomatic Relations (VCDR). Both withdrawals were triggered by pending International Court of Justice (ICJ) cases grounded in these treaties that were recently brought against the United States. Two weeks later, in an escalation of the ongoing trade dispute with China, the United States gave notice of withdrawal from the Universal Postal Union (UPU), the international body charged with overseeing the international mailing system. Finally, on October 22, 2018, President Trump announced that the United States would be terminating the Intermediate-Range Nuclear Forces (INF) Treaty with Russia. Unlike other withdrawals undertaken by the Trump administration, this latest round involved three Article II treaties to which the Senate had provided its advice and consent. In addition, the international commitments withdrawn from in this round were long-standing ones, with U.S. participation in the UPU going back as far as 1875.

The U.S. decision to withdraw from the Treaty of Amity came on the heels of a unanimous ruling by the ICJ directing the United States to ensure that the sanctions it imposed on Iran after withdrawing from the Joint Comprehensive Plan of Action (JCPOA) did not affect the export of humanitarian goods to the country.<sup>1</sup> In announcing the withdrawal, Pompeo stated:

I'm announcing that the United States is terminating the 1955 Treaty of Amity with Iran. This is a decision, frankly, that is 39 years overdue. In July, Iran brought a meritless case in the International Court of Justice alleging violations of the Treaty of Amity. . . . Iran is attempting to interfere with the sovereign rights of the United States to take lawful actions necessary to protect our national security. And Iran is abusing the ICJ for political and propaganda purposes and their case, as you can see from the decision, lacked merit.

. . .

In light of how Iran has hypocritically and groundlessly abused the ICJ as a forum for attacking the United States, I am therefore announcing today that the United States is terminating the Treaty of Amity with Iran. I hope that Iran's leaders will come to recognize that the only way to secure a bright future for its country is by ceasing their campaign of terror and destruction around the world.<sup>2</sup>

Ratified by the United States on September 14, 1956, after the Senate provided its advice and consent on July 11, 1956, the Treaty of Amity addresses economic and consular relations

<sup>1</sup> For further discussion of this ICJ case and the provisional measures ordered in it, see generally Jean Galbraith, *Contemporary Practice of the United States*, 113 AJIL 174 (2019).

<sup>2</sup> U.S. Dep't of State Press Briefing, Remarks to the Media (Oct. 3, 2018), at <https://www.state.gov/secretary/remarks/2018/10/286417.htm> [<https://perma.cc/2V8J-3FPS>].

between the United States and Iran.<sup>3</sup> Article XXI of the Treaty provides for ICJ jurisdiction over disputes concerning the interpretation or application of the Treaty.<sup>4</sup> Article XXIII, which contains the withdrawal provision, provides in relevant part that “[e]ither High Contracting Party may, by giving one year’s written notice to the other High Contracting Party, terminate the present Treaty at the end of the initial ten-year period or at any time thereafter.”<sup>5</sup> As a matter of U.S. domestic law, the prevailing view is that the president has the power to withdraw the United States from treaties approved by the Senate without returning to the Senate, as long as the withdrawal is consistent with international law.<sup>6</sup> This view has never been resolved by the Supreme Court and is not without dispute.<sup>7</sup> In practice, however, it is the approach taken by the executive branch, and provided that the executive branch has given the requisite written notice to Iran, the U.S. withdrawal will become effective in October 2019. While the practical importance of the Treaty of Amity has been limited since the Iranian revolution in the late 1970s, U.S. withdrawal will have the effect of removing a jurisdictional gateway to the ICJ that both countries have used in the past.<sup>8</sup>

On the same day that Pompeo announced the planned U.S. withdrawal from the Treaty of Amity, Bolton declared that the United States would withdraw from the VCDR’s Optional Protocol Concerning the Compulsory Settlement of Disputes, following a suit brought against the United States in the ICJ by Palestine.<sup>9</sup> This Optional Protocol provides for ICJ jurisdiction

<sup>3</sup> Treaty of Amity, Economic Relations, and Consular Rights, Iran-U.S., Aug. 15, 1955, 8 UST 899.

<sup>4</sup> *Id.* Art. XXI(2).

<sup>5</sup> *Id.* Art. XXIII(3).

<sup>6</sup> While “[t]he Constitution provides that the President can make treaties with the advice and consent of two-thirds of the Senate, . . . it says nothing specific about what domestic actor or actors have the power to withdraw the United States from treaties.” Jean Galbraith, *The President’s Power to Withdraw the United States from International Agreements at Present and in the Future*, 111 AJIL UNBOUND 445, 446 (2018). Since the 1930s, presidents have unilaterally withdrawn the United States from numerous Article II treaties, including President Carter’s high-profile decision to withdraw the United States from its mutual defense treaty with Taiwan in the late 1970s. See generally Curtis A. Bradley, *Treaty Termination and Historical Gloss*, 92 TEX. L. REV. 773 (2014) (tracing the historical development of the constitutional understanding that the president has the unilateral authority to terminate Article II treaties). Both *Restatement (Third) of Foreign Relations Law* and *Restatement (Fourth) of Foreign Relations Law* consider the president to have the authority to withdraw the United States from Article II treaties where this withdrawal is permitted under international law. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 339 (1986); RESTATEMENT (FOURTH) OF FOREIGN RELATIONS LAW § 313 (2018).

<sup>7</sup> In *Goldwater v. Carter*, the Supreme Court concluded that it lacked jurisdiction to address the constitutionality of President Carter’s withdrawal from the mutual defense treaty with Taiwan. 444 U.S. 996 (1979). For a recent argument that the president does not have the unilateral authority to terminate some Article II treaties even where permitted to do so by international law, see Harold Hongju Koh, *Presidential Power to Terminate International Agreements*, 128 YALE L. J. F. 432, 454 (2018) (arguing that “U.S. withdrawal from a long-standing treaty or international organization . . . should not become effective without congressional involvement”).

<sup>8</sup> Galbraith, *supra* note 1, at \_\_\_ (noting three prior ICJ cases grounded in the Treaty of Amity, two of which were brought by Iran); see also Chimène Keitner, *What Are the Consequences of the Trump Administration’s Recent Treaty Withdrawals?*, JUST SECURITY (Oct. 17, 2018), at <https://www.justsecurity.org/61101/consequences-trump-administrations-treaty-withdrawals> (describing the Treaty of Amity as “defunct *de facto* for decades”); John Bellinger, *Thoughts on the ICJ’s Decision in Iran v. United States and the Trump Administration’s Treaty Withdrawals*, LAWFARE (Oct. 5, 2018), at <https://www.lawfareblog.com/thoughts-icjs-decision-iran-v-united-states-and-trump-administrations-treaty-withdrawals> (calling the U.S. withdrawal a “prudent” response to Iran’s use of the Treaty of Amity “as an instrument of lawfare”).

<sup>9</sup> White House Press Release, Press Briefing by Press Secretary Sarah Sanders, Small Business Administrator Linda McMahon, and National Security Advisor (Oct. 3, 2018), at <https://www.whitehouse.gov/briefings-statements/press-briefing-press-secretary-sarah-sanders-small-business-administrator-linda-mcmahon-national-security-advisor-100318/> [<https://perma.cc/CTX6-W8N5>] [hereinafter Bolton Briefing]. For further discussion of this ICJ case, see generally Jean Galbraith, *Contemporary Practice of the United States*, 113 AJIL 174 (2019).

between parties over all disputes “arising out of the interpretation or application of” the VCDR, which in turn sets forth international legal rules regarding diplomatic relations between states.<sup>10</sup> The United States ratified the VCDR and the Optional Protocol on November 8, 1972, a few years after the Senate had provided its advice and consent to both on September 14, 1965.<sup>11</sup>

Bolton stated:

In addition to the Treaty of Amity, I am announcing that the President has decided that the United States will withdraw from the Optional Protocol and Dispute Resolution to the Vienna Convention on Diplomatic Relations. This is in connection with a case brought by the so-called “State of Palestine,” naming the United States as defendant, challenging our move of our embassy from Tel Aviv to Jerusalem.

I’d like to stress: The United States remains a party to the underlying Vienna Convention on Diplomatic Relations and we expect all other parties to abide by their international obligations under the Convention.

Our actions today are consistent with the decisions President Reagan made in the 1980s in the wake of the politicized suits against the United States by Nicaragua to terminate our acceptance of the Optional Compulsory Jurisdiction of the International Court of Justice under Article 36(2) of the ICJ statute and his decision to withdraw from a bilateral treaty with Nicaragua.

It is also consistent with the decision President Bush made in 2005 to withdraw from the Optional Protocol to the Vienna Convention on Consular Relations following the ICJ’s interference in our domestic criminal justice system.

So our actions today deal with the treaties and current litigation involving the United States before the International Court of Justice. Given this history and Iran’s abuse of the ICJ, we will commence a review of all international agreements that may still expose the United States to purported binding jurisdiction dispute resolution in the International Court of Justice. The United States will not sit idly by as baseless, politicized claims are brought against us.<sup>12</sup>

In response to a question, Bolton further emphasized that both treaty withdrawals were at least partly motivated by the administration’s concerns about international courts:

Look, this is really—has less to do with Iran and the Palestinians than with the continued consistent policy of the United States to reject the jurisdiction of the International Court of Justice, which we think is politicized and ineffective. It relates, obviously, in part, to our views on the International Criminal Court and to the nature of so-called purported international courts to be able to bind the United States.<sup>13</sup>

<sup>10</sup> Vienna Convention on Diplomatic Relations and Optional Protocol on Disputes, Art. 1, Apr. 18, 1961, 23 UST 3227, 500 UNTS 95 [hereinafter VCDR & Op-Pro].

<sup>11</sup> See *id.* Several more years would pass before the United States passed legislation consistent with the VCDR with respect to diplomatic immunity. See William F. Marmon, Jr., Note, *Diplomatic Relations Act of 1978 and Its Consequences*, 19 VA. J. INT’L L. 131, 139 (1978) (observing that the preexisting statutory scheme, unlike the VCDR, “did not distinguish among different classes of diplomatic staff for purposes of granting immunity”).

<sup>12</sup> Bolton Briefing, *supra* note 9.

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

It is unclear whether the United States has a right under international law to withdraw from the Optional Protocol. The treaty itself does not contain an express provision governing withdrawal.<sup>14</sup> The validity of the U.S. withdrawal under international law therefore turns on whether it was performed in accordance with the relevant principles of customary international law. Article 56 of the Vienna Convention on the Law of Treaties (VCLT), which may reflect customary international law, provides:

1. A treaty which contains no provision regarding its termination and which does not provide for denunciation or withdrawal is not subject to denunciation or withdrawal unless:
  - a. It is established that the parties intended to admit the possibility of denunciation or withdrawal; or
  - b. A right of denunciation or withdrawal may be implied by the nature of the treaty.
2. A party shall give not less than twelve months' notice of its intention to denounce or withdraw from a treaty under paragraph 1.<sup>15</sup>

Article 56 “establishes a general presumption against unilateral denunciation.”<sup>16</sup> Absent an indication that the parties intended the possibility of withdrawal from the Optional Protocol, the lawfulness of the announced U.S. withdrawal turns on whether treaties aimed at establishing a dispute settlement process are the type for which a right of withdrawal should be implied. This question received attention in the lead-up to the VCLT, with Humphrey Waldock reporting his view to the International Law Commission that “a treaty of arbitration, conciliation or judicial settlement” contained an implied right of withdrawal.<sup>17</sup> In the *Fisheries Jurisdiction* case, the ICJ declined to “examine or pronounce” upon the “views expressed by certain authorities to the effect that treaties of judicial settlement or declarations of acceptance of the compulsory jurisdiction of the Court are among those treaty provisions which, by their very nature, may be subject to unilateral denunciation in the absence of express provisions regarding their duration or termination.”<sup>18</sup>

Even if the Optional Protocol is the kind of treaty covered by Article 56(1)(b), the United States has not sought to withdraw from it in a manner consistent with Article 56(2). Although Article 56(2) requires one year of notice, the United States indicated in its notification to the UN

<sup>14</sup> See generally VCDR & Op. Pro, *supra* note 10.

<sup>15</sup> Vienna Convention on the Law of Treaties, Art. 56, 1155 UNTS 331, 8 ILM 679 (1969) [hereinafter VCLT]. The VCLT includes other grounds for withdrawal that do not appear applicable here, including material breach under specified circumstances, see *id.* Art. 60, impossibility of performance, see *id.* Art. 61, and fundamental change of circumstances, see *id.* Art. 62. See also *Gabčíkovo-Nagymaros Project* (Hung. v. Slov.), 1997 ICJ Rep. 7, 65 (Sept. 25) (concluding that “the stability of treaty relations requires that the plea of fundamental change of circumstances be applied only in exceptional cases”). The United States is not a party to the VCLT but regards many of its provisions as reflective of customary international law. See U.S. Dep’t of State, Vienna Convention on the Law of Treaties, at <https://www.state.gov/s/l/treaty/faqs/70139.htm> [<https://perma.cc/5R7Q-ABQF>].

<sup>16</sup> Theodore Christakis, *Article 56, in 2 THE VIENNA CONVENTIONS ON THE LAW OF TREATIES: A COMMENTARY* 1251, 1257 (Olivier Corten & Pierre Klein eds., 2011).

<sup>17</sup> Laurence R. Helfer, *Terminating Treaties, in THE OXFORD GUIDE TO TREATIES* 634, 638 (Duncan Hollis ed., 2012) (quoting Waldock’s 1963 report to the International Law Commission and noting the tension between his position and the approach previously recommended by Gerald Fitzmaurice); see also Christakis, *supra* note 16, at 1273 (noting that Waldock’s approach on this issue “provoked a sharp reaction from some members of the ILC”).

<sup>18</sup> *Fisheries Jurisdiction* (U.K. v. Iceland), Judgment, 1973 ICJ Rep. 3, at para. 29 (Feb. 2), at <https://www.icj-cij.org/files/case-related/55/055-19730202-JUD-01-00-EN.pdf>.

secretary-general (who serves as the Optional Protocol's depository) that its denunciation was immediately effective. The United States wrote that it "hereby withdraws" from the Optional Protocol and that "[a]s a consequence of this withdrawal, the United States will no longer recognize the jurisdiction of the International Court of Justice reflected in that Protocol."<sup>19</sup> The United States had used identical language in communicating its withdrawal from the Optional Protocol to the Vienna Convention on Consular Relations in 2005.<sup>20</sup> If withdrawal with immediate effect is not allowed for this treaty as a matter of international law, there is a strong argument that it also lies beyond the president's power to effectuate as a matter of U.S. domestic law.<sup>21</sup>

Two weeks after the United States announced its withdrawal from the Optional Protocol, it also declared its intent to withdraw from the Universal Postal Union (UPU).<sup>22</sup> Originally established in 1874, the UPU describes itself as "the second oldest international organization worldwide."<sup>23</sup> Among other things, it establishes the rates that member states' postal services may charge to deliver mail and small packages worldwide.<sup>24</sup> Pursuant to a 1969 agreement adopted by the UPU's governing body establishing what is known as the "terminal dues" system, the national postal service of a package's country of origin must reimburse the postal service of the destination country for the cost of handling and delivering the item.<sup>25</sup> Under the current arrangement, which is intended to "progressively incorporate the developing and least developed countries into a target system," countries pay terminal dues that vary depending on their particular stage of economic development.<sup>26</sup> In practice, this has meant that the cost of shipping small packages to the United States from China and other developing countries is often cheaper than shipping domestically within the United States.<sup>27</sup> The U.S. Postal Service lost an estimated \$170 million in fiscal year 2017 as a result of the terminal dues system.<sup>28</sup>

In announcing the U.S. notice of withdrawal from the UPU, White House Press Secretary Sarah Sanders stated:

<sup>19</sup> United Nations, Optional Protocol to the Vienna Convention on Diplomatic Relations, Concerning the Compulsory Settlement of Disputes, at [https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=III-5&chapter=3&clang=\\_en](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=III-5&chapter=3&clang=_en) (reporting the U.S. communication of October 12, 2018).

<sup>20</sup> Letter from Condoleezza Rice, U.S. Secretary of State, to Kofi Annan, UN Secretary-General (Mar. 7, 2005), available at <https://www.state.gov/documents/organization/87288.pdf> [<https://perma.cc/2RS9-DVZL>].

<sup>21</sup> See RESTATEMENT (FOURTH) OF FOREIGN RELATIONS LAW § 313 ("[a]ccording to established practice, the President has the authority to act on behalf of the United States in . . . withdrawing the United States from treaties, either on the basis of terms in the treaty allowing for such action (such as a withdrawal clause) or on the basis of international law that would justify such action"); Bradley, *supra* note 6, at 824 n. 292 (stating that "if international law causes a treaty to remain in force, then the U.S. Constitution may give the treaty a domestic-law status that cannot be terminated unilaterally by the President" and noting the tension between this point and the 2005 withdrawal from the Optional Protocol to the Vienna Convention on Consular Relations).

<sup>22</sup> White House Press Release, Statement from the Press Secretary (Oct. 17, 2018), at <https://www.whitehouse.gov/briefings-statements/statement-press-secretary-38> [<https://perma.cc/82Q7-VCVK>] [hereinafter "White House UPU Press Release"].

<sup>23</sup> Universal Postal Union, *The UPU*, <http://www.upu.int/en/the-upu/the-upu.html> (last visited Nov. 4, 2018).

<sup>24</sup> See *id.*

<sup>25</sup> See Universal Postal Union, *About Terminal Dues and Transit Charges*, at <http://www.upu.int/en/activities/terminal-dues-and-transit-charges/about-terminal-dues-and-transit-charges.html>.

<sup>26</sup> *Id.*; see also Eliot Kim, *Withdrawal from the Universal Postal Union: A Guide for the Perplexed*, LAWFARE (Oct. 31, 2018), at <https://www.lawfareblog.com/withdrawal-universal-postal-union-guide-perplexed>.

<sup>27</sup> Kim, *supra* note 26. Goods from Chinese companies account for approximately 60% of all packages shipped into the United States. Glenn Thrush, *Trump Opens New Front in His Battle with China: International Shipping*, N.Y. TIMES (Oct. 17, 2018), at <https://www.nytimes.com/2018/10/17/us/politics/trump-china-shipping.html>.

<sup>28</sup> Kim, *supra* note 26 (citing a report from the Postal Regulatory Commission).



President Donald J. Trump received a report from the Department of State pursuant to the August 23, 2018, Presidential Memorandum on “Modernizing the Monetary Reimbursement Model for the Delivery of Goods Through the International Postal System and Enhancing the Security and Safety of International Mail.” The report noted that sufficient progress has not been made on reforming terms of the Acts of the Universal Postal Union (UPU) in line with the policies of the United States outlined in the Memorandum. The report also recommended steps the United States can take to address the problems identified in the Memorandum.

The President concurs with the Department of State’s recommendation to adopt self-declared rates for terminal dues as soon as practical, and no later than January 1, 2020. The Department of State will also file notice that the United States will withdraw from the UPU. This will begin a one-year withdrawal process, as set forth in the UPU Constitution. During this period, the Department of State will seek to negotiate bilateral and multilateral agreements that resolve the problems discussed in the Presidential Memorandum. If negotiations are successful, the Administration is prepared to rescind the notice of withdrawal and remain in the UPU.<sup>29</sup>

Expressing his regret at the U.S. decision, UPU Director-General Bishar Hussein pledged to meet with American officials regarding the withdrawal.<sup>30</sup> A spokesman for the Chinese Foreign Ministry also expressed disappointment with the U.S. decision, saying that “China is committed to upholding multilateralism” and pledging “to work with all relevant parties to contribute to the development of the international postal cause.”<sup>31</sup>

Although neither the Presidential Memorandum nor the press statement characterized the U.S. move as part of the ongoing U.S. trade dispute with China, the decision could exacerbate already-strained trade relations between the two countries.<sup>32</sup> Reporting indicates that China was a focal point in the decision making surrounding withdrawal and that the United States will unilaterally increase postal rates on China if the announced withdrawal is concluded.<sup>33</sup>

According to Article 12 of the UPU Constitution (as amended), the U.S. withdrawal becomes effective one year after notice is received by the UPU director-general,<sup>34</sup> which in this case would make withdrawal effective on October 17, 2019.<sup>35</sup> The U.S. withdrawal is

<sup>29</sup> White House Press Release, Statement from the Press Secretary (Oct. 17, 2018), at <https://www.whitehouse.gov/briefings-statements/statement-press-secretary-38> [<https://perma.cc/82Q7-VCVK>] [hereinafter White House UPU Press Release].

<sup>30</sup> Universal Postal Union Press Release, Statement on the Decision of the United States of America to Withdraw from the Universal Postal Union Treaties (Oct. 17, 2018), at [http://news.upu.int/no\\_cache/nd/statement-on-the-decision-of-the-united-states-of-america-to-withdraw-from-the-universal-postal-union-treaties](http://news.upu.int/no_cache/nd/statement-on-the-decision-of-the-united-states-of-america-to-withdraw-from-the-universal-postal-union-treaties).

<sup>31</sup> Chinese Foreign Ministry Press Release, Foreign Ministry Spokesperson Lu Kang’s Regular Press Conference on October 18, 2018 (Oct. 18, 2018), at [https://www.fmprc.gov.cn/mfa\\_eng/xwfw\\_665399/s2510\\_665401/t1605226.shtml](https://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/t1605226.shtml).

<sup>32</sup> Danielle Paquette, *Trump Ditches 144-Year-Old Postal Pact that Boosts Chinese Retailers*, WASH. POST (Oct. 17, 2018), at [https://www.washingtonpost.com/business/economy/trump-ditches-144-year-old-postal-pact-that-boosts-chinese-retailers/2018/10/17/88ae6a6-d234-11e8-8c22-fa2ef74bd6d6\\_story.html?utm\\_term=.d320f10491d6](https://www.washingtonpost.com/business/economy/trump-ditches-144-year-old-postal-pact-that-boosts-chinese-retailers/2018/10/17/88ae6a6-d234-11e8-8c22-fa2ef74bd6d6_story.html?utm_term=.d320f10491d6).

<sup>33</sup> Thrush, *supra* note 27.

<sup>34</sup> Fourth Additional Protocol to the Constitution of the UPU, Art. III (1989) (amending Article 12 of the UPU Constitution).

<sup>35</sup> Universal Postal Union Press Release, Statement of UPU Deputy General Pascal Clivaz on the Decision by the Government of the United States of America to Withdraw from the Universal Postal Union Treaties (Oct. 18,



particularly notable in light of the length of time which the United States has belonged to the UPU. The United States first became a party to the UPU's predecessor, the General Postal Union, in 1875, when it joined the Treaty Concerning the Formation of a General Postal Union,<sup>36</sup> also known as the Treaty of Berne. In the intervening years, the General Postal Union became the UPU (in 1878), became a UN specialized agency (in 1948), and made numerous changes to its foundational documents and regulatory practices.<sup>37</sup>

As a matter of U.S. domestic law, discretion over international agreements related to the postal system has long been delegated by Congress to the executive branch.<sup>38</sup> The United States joined the Treaty of Berne not via the advice and consent of the Senate, but rather as an *ex ante* congressional-executive agreement that relied on preexisting authority delegated by Congress to the president and the post-master general.<sup>39</sup> Under the most recent statutory delegation, the secretary of state has "the power to conclude postal treaties, conventions, and amendments related to international postal services."<sup>40</sup> The statute does not specify that it is delegating the power to terminate such agreements, but the overall structure of *ex ante* congressional-executive agreements gives reason to infer that the executive branch has this power as well.<sup>41</sup> This preexisting statutory delegation will enable the executive branch to make complementary agreements (should it decide to

2018), at [http://news.upu.int/no\\_cache/nd/statement-of-upu-deputy-director-general-pascal-clivaz-on-the-decision-by-the-government-of-the-united-states-of-america-to-withdraw-from-the-universal-postal-union-treaties](http://news.upu.int/no_cache/nd/statement-of-upu-deputy-director-general-pascal-clivaz-on-the-decision-by-the-government-of-the-united-states-of-america-to-withdraw-from-the-universal-postal-union-treaties) (observing that notice was received on October 17, 2018).

<sup>36</sup> Treaty Concerning the Formation of a General Postal Union, 19 Stat. 577 (1874).

<sup>37</sup> Rebecca Bratspies, *Universal Postal Union*, OXFORD PUB. INT'L L., at <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e569>.

<sup>38</sup> For the earliest such delegation, see Act of Feb. 20, 1792, ch. 7, § 26, 1 Stat. 232, 239 (authorizing the postmaster general to enter into agreements with international counterparts for mail delivery).

<sup>39</sup> At the time, the operative statutory delegation came from An Act to Revise, Consolidate, and Amend the Statutes Relating to the Post Office Department, 17 Stat. 283 (1872) (providing that "the Postmaster-General, by and with the advice and consent of the President, may negotiate and conclude postal treaties or conventions, and may reduce or increase the rates of postage on mail-matter conveyed between the United States and foreign countries"). The postmaster general of the United States duly "ratified and approved" the Treaty of Berne on March 8, 1875, and the president "approve[d]" the treaty on the same day. Treaty Concerning the Formation of a General Postal Union, 19 Stat. 577, 588 (1874). This use of an *ex ante* congressional-executive agreement rather than an Article II treaty would later be cited as historical practice justifying the broader use of congressional-executive agreements as a substitute for Article II treaties. *E.g.*, Myres S. McDougal & Asher Lans, *Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy: I*, 54 YALE L. J. 181, 344 (1945) ("the United States has remained a member of the Universal Postal Union since 1875 [and i]n [that] case also, the agreement was approved only by the President, pursuant to authority contained in the postal statutes"); An Act to Provide for the Participation of the United States in the International Monetary Fund and the International Bank for Reconstruction and Development: Hearing on H.R. 3314 Before the S. Comm. on Banking & Currency, 79th Cong. 547 (1945) ("Reference has been made above to United States membership in the Universal Postal Union pursuant to specific authorization by the Congress to the executive to 'negotiate and conclude postal treaties or conventions' and to 'reduce or increase the rates of postage on mail matter conveyed between the United States and foreign countries.'") (citing the Act of June 8, 1872).

<sup>40</sup> Postal Accountability and Enhancement Act, Pub. L. No. 109-435, at §405, 120 Stat. 3198, 3230 (2006) (codified at 39 U.S.C. § 407) (further setting out objectives that the executive branch should pursue in its negotiations).

<sup>41</sup> See STEPHEN P. MULLIGAN, CONG. RESEARCH SERV., R44761, WITHDRAWAL FROM INTERNATIONAL AGREEMENTS: LEGAL FRAMEWORK, THE PARIS AGREEMENT, AND THE IRAN NUCLEAR AGREEMENT 7 (2018) (observing that "[f]or congressional-executive agreements that Congress has preauthorized by statute (called *ex ante* agreements), Presidents sometimes have unilaterally terminated the agreement without objection"). The statute does expressly indicate that the secretary of state has power to "renegotiate" postal treaties as well as to make them in the first place. Pub. L. No. 109-435, at § 405; 120 Stat. at 3231.

stay in the UPU) or substitute agreements (should it follow through on its notification and exit the UPU) without the need for subsequent congressional approval of these agreements.

Continuing his administration's retreat from various international commitments, President Trump stated on October 20, 2018, that he planned to withdraw the United States from the bilateral Intermediate-Range Nuclear Forces (INF) Treaty with Russia.<sup>42</sup> Explaining his decision to withdraw, Trump told reporters that "Russia has not, unfortunately, honored the agreement. So we're going to terminate the agreement, and we're going to pull out."<sup>43</sup> He continued, "We'll have to develop those weapons, unless Russia comes to us, and China comes to us, and they all come to us and they say 'Let's really get smart and let's none of us develop those weapons.'"<sup>44</sup>

Ratified by the United States on June 1, 1988 after the Senate provided its advice and consent on May 27, 1988,<sup>45</sup> the INF prohibits the United States and Russia "from possessing, producing or test-flying ground-launched ballistic and cruise missiles with a range of 500 to 5,500 kilometers and their launchers."<sup>46</sup> In a departure from other arms control treaties concluded between the United States and the Soviet Union, the INF, rather than regulating the quantity of weapons each country may possess, "call[s] for eliminating an entire class of weapons."<sup>47</sup> It does not, however, prohibit the research and development of intermediate-range nuclear missiles.<sup>48</sup> In December 2017, amidst U.S. complaints about Russian violations of the Treaty, the State Department announced that the Pentagon had begun "INF Treaty-compliant research and development (R&D) by reviewing military concepts and options for conventional, ground-launched, intermediate-range missile systems."<sup>49</sup>

Russian violations were publicly announced by the Obama administration in 2014,<sup>50</sup> although the United States was reportedly aware of Russian infractions as early as 2008.<sup>51</sup> As a result of these activities, Congress in recent years began requiring the president to submit findings regarding Russian compliance with the INF. Section 1243 of the John S. McCain National Defense Authorization Act (NDAA) for Fiscal Year 2019, for example, requires the president to determine whether the core prohibitions of the INF Treaty "remain binding on the United States as a matter of United States law."<sup>52</sup> The following section expresses the

<sup>42</sup> Donald J. Trump, Remarks in an Exchange with Reporters in Elko, Nevada, 2018 DAILY COMP. PRES. DOC. No. 718, at 3 (Oct. 20).

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 4–5.

<sup>45</sup> Treaty Between the United States of America and the Union of Soviet Socialist Republics on the Elimination of Their Intermediate-Range and Shorter-Range Missiles, U.S.-U.S.S.R., Dec. 8, 1987, 1657 UNTS 2.

<sup>46</sup> Hilary Hurd & Elena Chachko, *U.S. Withdrawal from the INF Treaty: The Facts and the Law*, LAWFARE (Oct. 25, 2018), at <https://www.lawfareblog.com/us-withdrawal-inf-treaty-facts-and-law>.

<sup>47</sup> *Id.*

<sup>48</sup> John Hudson & Paul Sonne, *Bolton Pushes Trump Administration to Withdraw from Landmark Arms Treaty*, WASH. POST (Oct. 19, 2018), at [https://www.washingtonpost.com/world/national-security/bolton-pushes-trump-administration-to-withdraw-from-landmark-arms-treaty/2018/10/19/f0bb8531-e7ce-4a34-b7ba-558f8b068dc5\\_story.html?utm\\_term=.c7ca9ac48f46](https://www.washingtonpost.com/world/national-security/bolton-pushes-trump-administration-to-withdraw-from-landmark-arms-treaty/2018/10/19/f0bb8531-e7ce-4a34-b7ba-558f8b068dc5_story.html?utm_term=.c7ca9ac48f46).

<sup>49</sup> U.S. Dep't of State Press Release, Bureau of Arms Control, Verification and Compliance Factsheet INF Treaty: At a Glance (Dec. 8, 2017), at <https://www.state.gov/t/avc/rls/2017/276361.htm> [<https://perma.cc/H9HQ-JW6A>].

<sup>50</sup> U.S. Dep't of State, *Adherence to and Compliance with Arms Control, Nonproliferation and Disarmament Agreements and Commitments* 8 (2014), available at <https://www.state.gov/documents/organization/230108.pdf> [<https://perma.cc/4R6D-6QL2>].

<sup>51</sup> Hurd & Chachko, *supra* note 46.

<sup>52</sup> Pub. L. No. 115-232, § 1243(a)(2), \_\_ Stat. \_\_ (2018).

sense of Congress that Russian violations “constitute a material breach of the INF Treaty,” legally entitling the United States “to suspend the operation of the INF Treaty in whole or in part for so long as the Russian Federation continues to be in material breach of the INF Treaty.”<sup>53</sup> Apart from Russian INF Treaty violations, however, the Trump administration considers an additional interest in terminating the treaty to arise from China’s military buildup in the Asia-Pacific region.<sup>54</sup> Because it was not a party to the INF Treaty, China has been able to build up its stockpile of intermediate-range ballistic missiles without restrictions.<sup>55</sup>

The INF Treaty’s withdrawal clause provides that:

1. This Treaty shall be of unlimited duration.
2. Each Party shall, in exercising its national sovereignty, have the right to withdraw from this Treaty if it decides that extraordinary events related to the subject matter of this Treaty have jeopardized its supreme interests. It shall give notice of its decision to withdraw to the other Party six months prior to withdrawal from this Treaty. Such notice shall include a statement of the extraordinary events the notifying Party regards as having jeopardized its supreme interests.<sup>56</sup>

U.S. allies in Europe expressed dismay at the U.S. decision to withdraw.<sup>57</sup> Following subsequent conversations with allies, on December 4, 2018, Pompeo announced that “the United States today declares it has found Russia in material breach of the treaty and will suspend our obligations as a remedy effective in 60 days unless Russia returns to full and verifiable compliance.”<sup>58</sup> Pompeo made clear that this sixty-day delay was at the request of European allies.<sup>59</sup> Pompeo’s remarks were accompanied by a statement issued the same day by the NATO foreign ministers declaring Russia in violation of the INF treaty, “call[ing] on Russia to return urgently to full and verifiable compliance” and noting that “[i]t is now up to Russia to preserve the INF treaty.”<sup>60</sup> In a question-and-answer period following Pompeo’s remarks, he appeared to indicate that the United States would give formal notice of its withdrawal from the INF treaty at the end of the sixty-day period if Russia failed to move sufficiently towards compliance within that period.<sup>61</sup>

<sup>53</sup> *Id.* § 1244, \_\_\_ Stat. at \_\_\_; cf. VCLT, *supra* note 15, Art. 60 (setting out the conditions under international law for suspension of treaty obligations in response to the material breach by another party).

<sup>54</sup> David E. Sanger & William J. Broad, *U.S. to Tell Russia It Is Leaving Landmark I.N.F. Treaty*, N.Y. TIMES (Oct. 19, 2018), at <https://www.nytimes.com/2018/10/19/us/politics/russia-nuclear-arms-treaty-trump-administration.html>.

<sup>55</sup> Hurd & Chachko, *supra* note 46.

<sup>56</sup> INF Treaty, *supra* note 45, Art. XV.

<sup>57</sup> Julian Borger & Andrew Roth, *EU Warns Trump of Nuclear Arms Race Risk after INF Withdrawal Move*, GUARDIAN (Oct. 23, 2018), at <https://www.theguardian.com/world/2018/oct/22/eu-us-nuclear-arms-race-inf-treaty-bolton-moscow> (describing responses from European leaders); Julian Borger, *European Diplomats Mount Last-Ditch Effort to Stop United States Scrapping INF Treaty*, GUARDIAN (Nov. 18, 2018), at <https://www.theguardian.com/world/2018/nov/18/inf-treaty-european-diplomats-us-russia> (describing European efforts to try to ward off the U.S. withdrawal).

<sup>58</sup> U.S. Dep’t of State Press Briefing, Press Availability at NATO Headquarters (Dec. 4, 2018), at <https://www.state.gov/secretary/remarks/2018/12/287873.htm> [<https://perma.cc/4FEG-PC6A>] [hereinafter Pompeo Briefing].

<sup>59</sup> *Id.* (“I will tell you, our European partners approve that extra time [of sixty days]”).

<sup>60</sup> NATO Press Release, Statement on the Intermediate-Range Nuclear Forces (INF) Treaty (Dec. 4, 2018), at [https://www.nato.int/cps/en/natohq/official\\_texts\\_161122.htm?selectedLocale=en](https://www.nato.int/cps/en/natohq/official_texts_161122.htm?selectedLocale=en).

<sup>61</sup> Pompeo Briefing, *supra* note 58 (“stating that “[t]he six-month period will begin to run 60 days from now” while also noting that “we would welcome a Russian change of heart . . . [and] over the next 60 days they have every chance to do that”).

The four recently announced U.S. withdrawals are consistent with a broader trend by the Trump administration of pulling out of international commitments and engagements. Since Trump took office in January 2017, his administration has announced the present or future U.S. withdrawal from the Paris Agreement, the JCPOA, UNESCO, and the UN Human Rights Council, as well as disengaging from the Global Compact on Migration and the Trans-Pacific Partnership.<sup>62</sup> Those commitments and engagements were multilateral, mostly of recent vintage, and joined by the United States as a matter of domestic law not via the advice and consent of the Senate, but rather through alternative constitutional processes. While continuing the trend of disengagement, the four withdrawals announced in October 2018 had some different features from the earlier wave. Two of the international agreements at issue were bilateral rather than multilateral; three of these agreements were joined by the United States as Article II treaties that received the advice and consent of two-thirds of the Senate; and all of these agreements were long-standing ones, dating back to 1875, 1956, 1972, and 1988. These announced terminations indicate that the Trump administration has come to look beyond the rollback of major Obama-era initiatives and to undertake a more wide-ranging reexamination of U.S. international commitments.

*Congress Passes Legislation Implementing the Marrakesh Treaty*  
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On October 9, 2018, President Trump signed into law a statute that implements the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled (Marrakesh Treaty).<sup>1</sup> The implementing legislation broadens access to published works for persons with visual disabilities and paves the way for the United States to ratify the Marrakesh Treaty.

Administered by the World Intellectual Property Organization (WIPO), the multilateral Marrakesh Treaty was adopted on June 27, 2013 at the end of a diplomatic conference convened in Morocco and entered into force on September 30, 2016.<sup>2</sup> The treaty requires parties

<sup>62</sup> See Kristina Daugirdas & Julian Davis Mortenson, *Contemporary Practice of the United States*, 111 AJIL 1036 (2017) (discussing the announced U.S. withdrawal from the Paris Agreement); Jean Galbraith, *Contemporary Practice of the United States*, 112 AJIL 107 (2018) (discussing the announced U.S. withdrawal from UNESCO); 112 AJIL 311 (2018) (discussing the cessation of U.S. participation in the Global Compact on Migration); 112 AJIL 315, 320 n. 42 (2018) (noting the decision not to seek ratification of the Trans-Pacific Partnership); 112 AJIL 514 (2018) (discussing the U.S. withdrawal from the JCPOA); 112 AJIL 745 (2018) (discussing the U.S. withdrawal from the UN Human Rights Council). The trend is not entirely in one direction, as the Trump administration has also pursued the making or renegotiation of some international agreements. See, e.g., Jean Galbraith, *Contemporary Practice of the United States*, 113 AJIL 151 (2018) (discussing the renegotiated NAFTA); 113 AJIL 142 (2018) (describing the recent passage of implementing legislation for the Marrakesh Treaty and noting more generally that from January 2017 to November 2018 the U.S. Senate advised and consented to six treaties).

<sup>1</sup> White House Press Release, President Donald J. Trump Signs H.R. 46, H.R. 2259, H.R. 4854, H.R. 4958, S. 791, S. 1668 and S. 2559 into Law (Oct. 10, 2018), at <https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-signs-h-r-46-h-r-2259-h-r-4854-h-r-4958-s-791-s-1668-s-2559-law> [https://perma.cc/T2CA-YEAG] [hereinafter White House Press Release].

<sup>2</sup> U.S. Dep't of State Press Release, Adoption of the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled (June 28, 2013), at

to implement copyright exceptions and limitations aimed at aiding the development of copyrighted works in accessible formats for persons with physical disabilities relating to vision or to the process of reading books.<sup>3</sup> The treaty also permits authorized organizations to share these materials across borders with authorized organizations or eligible persons located on the territory of other treaty parties.<sup>4</sup>

Although the United States has not ratified the treaty as of November 30, 2018,<sup>5</sup> it has now undertaken all the underlying legislative steps needed to ratify and implement it. On June 28, 2018, the U.S. Senate unanimously both gave its advice and consent to the Marrakesh Treaty and passed legislation to implement the treaty.<sup>6</sup> A few months later, the U.S. House of Representatives also unanimously passed the implementing legislation, and Trump subsequently signed the Marrakesh Treaty Implementation Act (MTIA) into law on October 9, 2018.<sup>7</sup> According to the U.S. Copyright Office, the United States is in the process of preparing its formal ratification for submission to WIPO.<sup>8</sup>

The MTIA amends the Copyright Act to expand a previous exemption that already permitted authorized entities “to reproduce or to distribute copies or phonorecords of a previously published, nondramatic literary work if such copies or phonorecords are reproduced or distributed in specialized formats exclusively for use by blind or other persons with disabilities.”<sup>9</sup> Specifically, the legislation broadens the exemption to cover all literary works and musical works “fixed in the form of text or notation.”<sup>10</sup> The act also allows such works to be reproduced in “an alternative manner or form,” rather than limiting duplication to specific technologies such as braille or digital text.<sup>11</sup> Finally, the MTIA adds new provisions to the Copyright Act focusing on the cross-border exchange feature of the Marrakesh Treaty. These new provisions permit authorized entities to export the reproduced works as set forth in the

2017.state.gov/r/pa/prs/ps/2013/06/211308.htm [https://perma.cc/5WG6-PHSC]; *Summary of the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled (MVT) (2013)*, WORLD INTELL. PROP. ORG., at [http://www.wipo.int/treaties/en/ip/marrakesh/summary\\_marrakesh.html](http://www.wipo.int/treaties/en/ip/marrakesh/summary_marrakesh.html) [https://perma.cc/5V4S-FGYP]. The United States signed the treaty on October 2, 2013. *Understanding the Marrakesh Treaty Implementation Act*, U.S. COPYRIGHT OFF., available at [https://www.copyright.gov/legislation/2018\\_marrakesh\\_faqs.pdf](https://www.copyright.gov/legislation/2018_marrakesh_faqs.pdf) [https://perma.cc/4BKM-A8W2] [hereinafter Copyright Office Information Sheet].

<sup>3</sup> Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled, Arts. 3, 4, June 27, 2013, 52 ILM 1312.

<sup>4</sup> *Id.* Art. 5.

<sup>5</sup> *WIPO-Administered Treaties*, WORLD INTELL. PROP. ORG., at [http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty\\_id=843](http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=843) [https://perma.cc/7JA9-7ZKG].

<sup>6</sup> 164 CONG. REC. S109,4421 (including a declaration that the treaty is non-self-executing); S. 2559, 115th Cong. (2018), 164 CONG. REC. S109,4810–11 (daily ed. June 28, 2018). As these sources indicate, both the treaty and the implementing legislation came to a vote through the unanimous consent procedure in the Senate.

<sup>7</sup> S. 2559, 115th Cong. (2018), 164 CONG. REC. H158,8838 (daily ed. September 25, 2018); White House Press Release, *supra* note 1.

<sup>8</sup> Copyright Office Information Sheet, *supra* note 2, at 3 (also noting that the treaty will enter into force for the United States ninety days after ratification).

<sup>9</sup> The Marrakesh Treaty Implementation Act, Pub. L. No. 115-261 (to be codified as amended at 17 U.S.C. § 121); Legislative Branch Appropriations Act of 1997, Pub. L. No. 104-197, 110 Stat. 2394 (codified as amended at 17 U.S.C. § 121).

<sup>10</sup> The Marrakesh Treaty Implementation Act § 2(a)(1)(A).

<sup>11</sup> *Id.* § 2(a)(1)(C)–(D).



treaty<sup>12</sup> and similarly permit authorized entities and eligible persons to import such works.<sup>13</sup>

The Marrakesh Treaty constituted one of six treaties that, as of November 15, 2018, the Senate has approved during the 115th Congress, which began on January 3, 2017. Prior to approving the Marrakesh Treaty, the Senate had given its advice and consent to four bilateral treaties.<sup>14</sup> Two of these were extradition treaties with Kosovo and Serbia,<sup>15</sup> while the other two established maritime boundaries with Micronesia and Kiribati.<sup>16</sup> The remaining treaty to which the Senate gave its advice and consent was an accession protocol approving Montenegro's entry into the North Atlantic Treaty Organization (NATO).<sup>17</sup> In addition to these treaties, the UN Convention on the Assignment of Receivables in International Trade has been reported out of the Senate Foreign Relations Committee for consideration by the full Senate.<sup>18</sup>

#### STATE DIPLOMATIC AND CONSULAR RELATIONS

##### *Palestine Brings a Case Against the United States in the International Court of Justice at a Fraught Time for U.S.-Palestinian Relations*

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While Palestine considers itself a state, the United States does not currently recognize it as such. The relationship between the two has continued to deteriorate following the December 2017 announcement that the United States would recognize Jerusalem as Israel's capital and move its embassy there. Alleging that the embassy relocation violates international law, Palestine brought a case against the United States in the International Court of Justice (ICJ) in September of 2018. The United States reacted by announcing its withdrawal from the Optional Protocol to the Vienna Convention on Diplomatic Relations Concerning the Compulsory Settlement of Disputes (Optional Protocol). Also in the fall of 2018, the Trump administration closed the Palestine Liberation Organization (PLO)

<sup>12</sup> *Id.* § 2(a)(2)(a). Authorized entities are defined as nonprofit organizations or governmental agencies with a primary mission to serve the visually impaired or other persons with disabilities. *Id.*, § 2(a)(2)(f).

<sup>13</sup> *Id.* § 2(a)(2)(b).

<sup>14</sup> 164 CONG. REC. S126,5417–18 (daily ed. July 26, 2018) (documenting the Senate's advice and consent to all four of these treaties through unanimous consent and including declarations that all four treaties are self-executing).

<sup>15</sup> Extradition Treaty with the Republic of Serbia, S. Treaty Doc. No. 115-1; Extradition Treaty with the Republic of Kosovo, S. Treaty Doc. No. 115-2.

<sup>16</sup> The Treaties with the Republic of Kiribati and the Government of the Federated States of Micronesia on the Delimitation of Maritime Boundaries, S. Treaty Doc. No. 114-13 (including two separate treaties under a single treaty document number).

<sup>17</sup> Protocol to the North Atlantic Treaty of 1949 on the Accession of Montenegro, S. Treaty Doc. No. 114-12; see also Kristina Daugirdas & Julian Davis Mortenson, *Contemporary Practice of the United States*, 111 AJIL 756, 762–64 (2017) (discussing the Senate's approval of this protocol).

<sup>18</sup> S. Exec. Rep. 115-7 (Sept. 12, 2018) (reporting this treaty forward with six declarations and five understandings). As of November 30, 2018, it remained to be seen whether it will receive a floor vote before the term of the current Congress ends in early January 2019.



office in Washington, curtailed its own Palestinian-focused mission in Jerusalem, and sharply cut U.S. funding focused on Palestinian interests.

On December 6, 2017, President Trump recognized Jerusalem as the capital of Israel and announced that the U.S. embassy in Israel would move from Tel Aviv to Jerusalem.<sup>1</sup> Despite objections from the Palestinians and widespread criticism from members of the UN Security Council and General Assembly,<sup>2</sup> on May 14, 2018, the United States officially opened its embassy in Jerusalem.<sup>3</sup> On that same day, Palestine informed the United States of its view that “any step taken by the United States to relocate its embassy to Jerusalem constitutes a violation of the” Vienna Convention on Diplomatic Relations (VCDR) “read in conjunction with relevant United Nations resolutions.”<sup>4</sup> On July 4, 2018, Palestine followed up to express its view that a dispute grounded in the VCDR and its Optional Protocol existed between the United States and Palestine.<sup>5</sup>

On September 28, 2018, Palestine filed an application to institute proceedings against the United States in the ICJ.<sup>6</sup> Emphasizing the special character of Jerusalem, the application discusses the city’s legal status and notes the existence of Security Council resolutions refusing to recognize Israel’s efforts to change this status.<sup>7</sup> The application then turns to the VCDR and construes it to require that any diplomatic mission be based on the territory of the “receiving state.”<sup>8</sup> The application also notes that the VCDR prohibits a mission from being “used in any manner incompatible with the functions of the mission as laid down in the present Convention or by other rules of general international law.”<sup>9</sup> Synthesizing these strands, the application argues that

[t]he relocation of the US Embassy in Israel to the Holy City of Jerusalem is in breach of the provisions of the Convention on Diplomatic Relations mentioned above as well as,

<sup>1</sup> For discussion of the Trump administration’s decision and responses by the international community, see Jean Galbraith, *Contemporary Practice of the United States*, 112 *AJIL* 306 (2018).

<sup>2</sup> *Id.* at 308–10.

<sup>3</sup> U.S. Dep’t of State Press Release, *On the Opening of U.S. Embassy Jerusalem* (May 14, 2018), *at* <https://www.state.gov/secretary/remarks/2018/05/282066.htm> [<https://perma.cc/GCP7-FPZG>].

<sup>4</sup> *Relocation of the United States Embassy to Jerusalem (Palestine v. U.S.)*, Application Instituting Proceedings, Annexes 2018 ICJ, at 38 (Sept. 28), *available at* <https://www.icj-cij.org/files/case-related/176/176-20180928-APP-01-01-EN.pdf> (reproducing this “note verbale” in which Palestine also requested “to be informed as soon as possible about the steps the United States is considering to ensure its actions are in line with the” VCDR).

<sup>5</sup> *Id.* at 39 (reproducing this second “note verbale”).

<sup>6</sup> *Relocation of the United States Embassy to Jerusalem (Palestine v. U.S.)*, Application Instituting Proceedings, 2018 ICJ (Sept. 28), *available at* <https://www.icj-cij.org/files/case-related/176/176-20180928-APP-01-00-EN.pdf> [hereinafter ICJ Application].

<sup>7</sup> *Id.* at 3–5 (citing Security Council Resolutions 252, 267, 298, 476, and 478). The two most recent of these—Resolutions 476 and 478—respectively “reconfirm[ed] that all legislative and administrative measures and actions taken by Israel, the occupying power, which purport to alter the character and status of the Holy City of Jerusalem have no legal validity” and “call[ed] upon . . . [t]hose States that have established diplomatic missions at Jerusalem to withdraw such missions from the Holy City.” SC Res. 476 (1980); SC Res. 478 (1980).

<sup>8</sup> ICJ Application, *supra* note 6, at 9–11. The VCDR uses the term “receiving state” frequently but does not have a provision that explicitly and specifically requires a diplomatic mission to be located on the premises of the receiving state. *See generally* Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 *UST* 3227, 500 *UNTS* 95. The receiving state does have an obligation to “either facilitate the acquisition on its territory, in accordance with its laws, by the sending State of premises necessary for its mission or assist the latter in obtaining accommodation in some other way.” *Id.* Art. 21(1).

<sup>9</sup> ICJ Application, *supra* note 6, at 11 (quoting VCDR Art. 41(3)).

more generally, of its object and purpose and of “other rules of general international law” to which the Convention refers.<sup>10</sup>

This is the first suit brought by Palestine before the ICJ.<sup>11</sup> It constitutes a further step by Palestine signaling and seeking to strengthen its claim to statehood. Important to Palestine’s ability to join the VCDR and its Optional Protocol—and therefore to develop its pathway to ICJ jurisdiction—was a resolution passed on November 29, 2012, by the UN General Assembly. This resolution granted Palestine non-member observer state status at the United Nations.<sup>12</sup> It also expressed support for a favorable decision by the UN Security Council with regards to granting Palestine full UN membership status,<sup>13</sup> though that has not since occurred. The lack of full UN membership notwithstanding, the UN secretary-general has since accepted Palestinian instruments of accession in his role as the depository for various multilateral agreements.<sup>14</sup>

In 2014, Palestine deposited its instrument of accession for the VCDR.<sup>15</sup> At the time, the United States responded by stating that

[t]he Government of the United States of America does not believe the “State of Palestine” qualifies as a sovereign State and does not recognize it as such. Accession to the Convention is limited to sovereign States. Therefore, the Government of the United States of America believes that the “State of Palestine” is not qualified to accede to the Convention and affirms that it will not consider itself to be in a treaty relationship with the “State of Palestine” under the Convention.<sup>16</sup>

Palestine acceded to the Optional Protocol on March 22, 2018,<sup>17</sup> several months after Trump’s decision to recognize Jerusalem as the capital of Israel. The United States once again issued a responsive notification citing its 2014 rejection, affirming its belief in Palestine’s lack of statehood, and stating that “the Government of the United States of America believes that the ‘State of Palestine’ is not qualified to accede to the Optional

<sup>10</sup> *Id.* at 12.

<sup>11</sup> Palestine did contribute a written statement to an ICJ advisory proceeding in 2004. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Written Statement Submitted by Palestine, 2004 ICJ (Jan. 30), available at <https://www.icj-cij.org/files/case-related/131/1555.pdf>.

<sup>12</sup> GA Res. 67/19, Status of Palestine in the United Nations (Dec. 4, 2012), at <https://unispal.un.org/DPA/DPR/unispal.nsf/0/19862D03C564FA2C85257ACB004EE69B>.

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

<sup>14</sup> Office of the UN Secretary General, Note to Correspondents – Accession of Palestine to Multilateral Treaties (Jan. 7, 2015), at <https://www.un.org/sg/en/content/sg/note-correspondents/2015-01-07/note-correspondents-accession-palestine-multilateral> (noting that “it is for States to make their own determination with respect to any legal issues raised by instruments circulated by the Secretary-General”); see also John Cerone, *The ICC and Palestinian Consent*, ASIL INSIGHT (Mar. 20, 2015), at <https://www.asil.org/insights/volume/19/issue/6/icc-and-palestinian-consent> (observing that in 2014 Switzerland and the Netherlands also accepted Palestinian accession to treaties for which they serve as depositories).

<sup>15</sup> UN Secretary-General, Vienna Convention on Diplomatic Relations: State of Palestine: Accession (Apr. 9, 2014), available at <https://treaties.un.org/doc/Publication/CN/2014/CN.176.2014-Eng.pdf>.

<sup>16</sup> Diplomatic Note, United States Mission to the United Nations New York (May 13, 2014), available at <https://treaties.un.org/doc/Publication/CN/2014/CN.256.2014-Eng.pdf>.

<sup>17</sup> UN Secretary-General, Optional Protocol to the Vienna Convention on Diplomatic Relations Concerning the Compulsory Settlement of Disputes: State of Palestine: Accession (Mar. 23, 2018), available at <https://treaties.un.org/doc/Publication/CN/2018/CN.149.2018-Eng.pdf> (noting that the action “was effected on 22 March”).

Protocol and affirms that it will not consider itself to be in a treaty relationship with the ‘State of Palestine’ under the Optional Protocol.”<sup>18</sup>

On October 3, 2018, the United States announced its withdrawal from the Optional Protocol, making clear that the case brought by Palestine was a motivating factor in this decision.<sup>19</sup> In a press conference making this announcement, National Security Advisor John Bolton reiterated the U.S. rejection of Palestinian statehood:

It’s not a state now. It does not meet the customary international law test of statehood. It doesn’t control defined boundaries. It doesn’t fulfill the normal functions of government. There are a whole host of reasons why it’s not a state. It could become a state, as the President said, but that requires diplomatic negotiations with Israel and others.<sup>20</sup>

Bolton did not expressly discuss whether or how the United States would defend itself in the pending ICJ proceedings. On November 2, the Legal Adviser to the State Department, Jennifer Newstead, wrote to the ICJ expressing the view that the ICJ “‘manifest[ly]” lacks jurisdiction over the case and stating that the United States would not participate in a meeting later that week at the ICJ regarding the case.<sup>21</sup> On November 15, the ICJ set a briefing schedule with respect to issues of jurisdiction and admissibility, calling for Palestine’s submission by May 15, 2019, and the U.S. submission by November 15, 2019.<sup>22</sup>

The U.S. withdrawal from the Optional Protocol itself would not deprive the ICJ of jurisdiction over the case, assuming such jurisdiction existed prior to withdrawal.<sup>23</sup> Whether such jurisdiction exists in the first place, however, depends on several difficult issues. One is whether Palestine is in fact a state, since the ICJ’s founding statute provides that “only states may be parties in cases before the Court.”<sup>24</sup> Another is what effect, if any, to give to the U.S. declarations that it does not consider itself in a treaty relationship with Palestine for either the VCDR or its Optional Protocol.<sup>25</sup> Yet another is the applicability of the ICJ’s *Monetary Gold*

<sup>18</sup> Diplomatic Note, United States Mission to the United Nations New York (May 1, 2018), *available at* <https://treaties.un.org/doc/Publication/CN/2018/CN.228.2018-Eng.pdf>.

<sup>19</sup> For further discussion of this announced withdrawal and the legal questions surrounding its validity, see Jean Galbraith, *Contemporary Practice of the United States*, 113 AJIL 133 (2019).

<sup>20</sup> White House Press Briefing, Press Briefing by Press Secretary Sarah Sanders, Small Business Administrator Linda McMahon, and National Security Advisor (Oct. 3, 2018), *at* <https://www.whitehouse.gov/briefings-statements/press-briefing-press-secretary-sarah-sanders-small-business-administrator-linda-mcmahon-national-security-advisor-100318> [<https://perma.cc/B4RU-A34K>] [hereinafter October 3 Press Briefing].

<sup>21</sup> ICJ Press Release, *Relocation of the United States Embassy to Jerusalem (Palestine v. U.S.)* (Nov. 30, 2018), *available at* <https://www.icj-cij.org/files/case-related/176/176-20181130-PRE-01-00-EN.pdf> (quoting the letter, which in turn referenced the U.S. notifications made when Palestine joined the VCDR and the Optional Protocol).

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

<sup>23</sup> *See, e.g.*, *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, Judgment, 1986 ICJ 14, para. 36 (June 27) (measuring jurisdiction based on the time the case was filed and stating that “[a]n extrinsic fact such as the subsequent lapse of the Declaration [or, as in the present case also, the Treaty containing a compromissory clause], by reason of the expiry of the period or by denunciation, cannot deprive the Court of the jurisdiction already established”) (quoting *Nottebohm Case (Liech. v. Guat.)*, Judgment, 1953 ICJ 111, 123 (Nov. 18)) (alteration in original).

<sup>24</sup> Statute of the International Court of Justice, Art. 34, para. 1.

<sup>25</sup> “It is disputed whether such declarations may qualify as reservations as stipulated in the Vienna Convention on the Law of Treaties.” Stefan Talmon, *The European Union – Turkey Controversy Over Cyprus or a Tale of Two Treaty Declarations*, 5 CHINESE J. INT’L L. 579, 587–89 (2006) (asserting that “[i]n practice, such declarations have . . . been treated like reservations” and that “[t]heir legal effect thus depends on the individual treaty and, in particular, on whether the statement excluding the application of the treaty in relation to the non-recognized entity is

principle about not adjudicating the interests of third parties without their consent.<sup>26</sup> It remains to be seen to what extent the United States will appear in the ICJ to contest the case with respect to both jurisdiction and the underlying merits.

In addition to the conflict over the relocation of the embassy, U.S.-Palestinian relations worsened on several other fronts over the late summer and fall of 2018. The Trump administration closed the PLO office in Washington, downgraded its own Palestinian-focused mission in Jerusalem, and slashed U.S. funding focused on Palestinian interests.

On September 10, the State Department announced the closure of the office of the General Delegation of the PLO located in Washington, D.C.<sup>27</sup> The State Department's press release stated:

We have permitted the PLO office to conduct operations that support the objective of achieving a lasting, comprehensive peace between Israelis and Palestinians. . . . However, the PLO has not taken steps to advance the start of direct and meaningful negotiations with Israel. To the contrary, PLO leadership has condemned a U.S. peace plan they have not yet seen and refused to engage with the U.S. government with respect to peace efforts and otherwise. As such, and reflecting Congressional concerns, the Administration has decided that the PLO office in Washington will close at this point. This decision is also consistent with Administration and Congressional concerns with Palestinian attempts to prompt an investigation of Israel by the International Criminal Court.<sup>28</sup>

On October 18, the State Department announced that it would be merging the U.S. Consulate General in Jerusalem into the U.S. Embassy in Jerusalem.<sup>29</sup> The U.S. Consulate General had historically been devoted to Palestinian affairs, acting as a "quasi-embassy."<sup>30</sup> The State Department cited efficiency as its driving motivation for the merger.<sup>31</sup> It stated that the merger "does not signal a change of U.S. policy on Jerusalem, the West Bank, or the Gaza Strip" and that "[t]he Administration is strongly committed to achieving a lasting and comprehensive peace that offers a brighter future to Israel and the Palestinians."<sup>32</sup>

incompatible with the object and purpose of the treaty"); see also John King Gamble, Jr., *Reservations to Multilateral Treaties: A Macroscopic View of State Practice*, 74 AJIL 372, 388 (1980) (noting the frequency of such declarations by Arab nations with respect to Israel).

<sup>26</sup> Compare Marko Milanović, *Palestine Sues the United States in the ICJ re Jerusalem Embassy*, EJIL: TALK! (Sept. 30, 2018), at <https://www.ejiltalk.org/palestine-sues-the-united-states-in-the-icj-re-jerusalem-embassy/#more-16519> (suggesting that "Palestine's claim runs headlong into the ICJ's longstanding *Monetary Gold* jurisprudence—that it will not adjudicate on claims that involve the legal interests of third parties without the consent of those parties"—since the case "clearly involves the existence (or not) of the rights of Israel vis-à-vis that territory, and Israel will obviously not consent to the ICJ's determination of these rights") with Alina Miron, *Palestine's Application the ICJ, neither Groundless nor Hopeless. A Reply to Marko Milanović*, EJIL: TALK! (Oct. 8, 2018), at <https://www.ejiltalk.org/palestines-application-the-icj-neither-groundless-nor-hopeless-a-reply-to-marko-milanovic/#more-16541> (suggesting that the *Monetary Gold* principle might not be applicable).

<sup>27</sup> U.S. Dep't of State Press Release, *Closure of the PLO Office in Washington* (Sept. 10, 2018), at <https://www.state.gov/t/pa/prs/ps/2018/09/285812.htm> [<https://perma.cc/B2PP-SCKS>].

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

<sup>29</sup> U.S. Dep't of State Press Release, *On the Merging of the U.S. Embassy Jerusalem and U.S. Consulate General Jerusalem* (Oct. 18, 2018), at <https://www.state.gov/secretary/remarks/2018/10/286731.htm> [<https://perma.cc/75CP-4M55>] [hereinafter October 18 Press Release].

<sup>30</sup> David M. Halbfinger, *U.S. Folding Jerusalem Consulate into Embassy, a Blow to Palestinians*, N.Y. TIMES (Oct. 18, 2018), at <https://www.nytimes.com/2018/10/18/world/middleeast/us-palestinians-consulate-jerusalem.html>.

<sup>31</sup> October 18 Press Release, *supra* note 29.

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

During the late summer and fall, the Trump administration reduced multiple streams of U.S. funding aimed at Palestinian interests. On August 31, 2018, the State Department announced that it would no longer provide funding for the UN Relief and Works Agency (UNRWA),<sup>33</sup> building on a decision in January to withhold \$65 million in previously anticipated funding.<sup>34</sup> The Department explained:

The Administration has carefully reviewed the issue and determined that the United States will not make additional contributions to UNRWA. When we made a U.S. contribution of \$60 million in January, we made it clear that the United States was no longer willing to shoulder the very disproportionate share of the burden of UNRWA's costs that we had assumed for many years. . . .

Beyond the budget gap itself and failure to mobilize adequate and appropriate burden sharing, the fundamental business model and fiscal practices that have marked UNRWA for years—tied to UNRWA's endlessly and exponentially expanding community of entitled beneficiaries—is simply unsustainable and has been in crisis mode for many years. The United States will no longer commit further funding to this irredeemably flawed operation.<sup>35</sup>

UNRWA provides humanitarian relief for Palestinian refugees.<sup>36</sup> UNRWA's definition for who classifies as a Palestinian refugee is relatively broad, covering "persons whose normal place of residence was Palestine during the period 1 June 1946 to 15 May 1948, and who lost both home and means of livelihood as a result of the 1948 conflict," with services also available to descendants of male Palestinian refugees.<sup>37</sup> As the definition does not require that individuals live outside occupied Palestinian territory, UNRWA states that it provides services to registered refugees living in the West Bank and Gaza Strip, as well as to those living in Jordan, Lebanon, and Syria.<sup>38</sup> The United States had previously been the UNRWA's largest donor, accounting for a third of the agency's roughly \$1.1 billion donations received in 2017.<sup>39</sup>

In addition to ceasing UNRWA contributions, the Trump administration has dramatically cut back on other Palestinian-related funding. On August 24, the administration signaled that it would be redirecting some \$200 million that had originally been budgeted to support

<sup>33</sup> U.S. Dep't of State Press Release, On U.S. Assistance to UNRWA (Aug. 31, 2018), at <https://www.state.gov/r/pa/prs/ps/2018/08/285648.htm> [<https://perma.cc/JNW3-DC78>] [hereinafter August 31 Press Release].

<sup>34</sup> See Galbraith, *supra* note 1, at 310.

<sup>35</sup> August 31 Press Release, *supra* note 33.

<sup>36</sup> UNRWA, *See What We Do*, at <https://www.unrwa.org/what-we-do>.

<sup>37</sup> UNRWA, *Palestine Refugees*, at <https://www.unrwa.org/palestine-refugees>.

<sup>38</sup> UNRWA, *Where We Work*, at <https://www.unrwa.org/where-we-work>.

<sup>39</sup> UNRWA, 2017 Pledges to UNRWA's Programmes (Cash and In-kind) – Overall Donor Ranking as of [of] 31 December 2017, available at [https://www.unrwa.org/sites/default/files/overalldonor\\_ranking.pdf](https://www.unrwa.org/sites/default/files/overalldonor_ranking.pdf). Since 2009 the United States has been the number one contributor to UNRWA, with U.S. contributions peaking in 2015 at \$380,593,116. UNRWA, Pledges to UNRWA (Cash and In-kind) for 2015 – Overall Donor Ranking in USD as of [of] 31 December 2015, available at [https://www.unrwa.org/sites/default/files/2015\\_donors\\_ranking\\_overall.pdf](https://www.unrwa.org/sites/default/files/2015_donors_ranking_overall.pdf). For more data on U.S. contributions since 2008, see UNRWA, *Donor Charts*, at <https://www.unrwa.org/how-you-can-help/government-partners/funding-trends/donor-charts>.



programs in the West Bank and Gaza.<sup>40</sup> On September 8, the administration redirected \$25 million that was originally intended for East Jerusalem hospitals caring for Palestinians.<sup>41</sup> On September 14, the United States Agency for International Development indicated that it would no longer use a pre-budgeted \$10 million for programs meant to bolster relationships between Palestinians and Israelis, and instead would focus only on programs supporting Israeli Jews and Arabs.<sup>42</sup> Finally, in October, Trump signed the Anti-Terrorism Clarification Act of 2018, which could have further substantial future impacts on U.S. funding in relation to Palestine.<sup>43</sup>

Collectively, these cuts in funding are reported to reflect a Trump administration aim of “maximum negotiating leverage over the Palestinians.”<sup>44</sup> The UNRWA cuts in particular appear aimed at influencing the role that the potential right of return for refugees has played in peace talks between Israelis and Palestinians. Mustafa Barghouti, the current secretary-general of the Palestinian National Initiative, has observed that the United States “tried to liquidate the issue of Jerusalem by saying they were removing it from the negotiating table, now they want to kill UNRWA with the aim of killing the right of the Palestinian refugees to return to their homeland.”<sup>45</sup> For its part, UNRWA expressed dismay at the U.S. decision and the perceived purpose underlying it. Its Commissioner-General, Pierre Krähenbühl, described the U.S. decision to cease funding as “an evident politicization of humanitarian aid” that “risks undermining the foundations of the international multi-lateral and humanitarian systems.”<sup>46</sup>

<sup>40</sup> David Brunnstrom, *Trump Cuts More Than \$200 Million in U.S. Aid to Palestinians*, REUTERS (Aug. 24, 2018), at <https://www.reuters.com/article/us-usa-palestinians/trump-cuts-more-than-200-million-in-u-s-aid-to-palestinians-idUSKCN1L923C>.

<sup>41</sup> *Trump Cuts \$25 Million in Aid for Palestinians in East Jerusalem Hospitals*, REUTERS (Sept. 8, 2018), at <https://www.reuters.com/article/us-usa-palestinians-hospitals/trump-axes-25-million-in-aid-for-palestinians-in-east-jerusalem-hospitals-idUSKCN1LO0O0>.

<sup>42</sup> Edward Wong, *U.S. Is Ending Final Source of Aid for Palestinian Civilians*, N.Y. TIMES (Sept. 14, 2018), at <https://www.nytimes.com/2018/09/14/world/middleeast/us-aid-palestinian-civilians.html>.

<sup>43</sup> Pub. L. 115-253, \_\_ Stat. \_\_ (2018) (providing among other things that as a condition of accepting U.S. funding, defendants to civil actions alleging injury based on international terrorism must accept personal jurisdiction in these actions). For a discussion of this act and its sizeable implications for the PLO, see Harry Graver & Scott R. Anderson, *Shedding Light on the Anti-Terrorism Clarification Act of 2018*, LAWFARE (Oct. 25, 2018), at <https://www.lawfareblog.com/shedding-light-anti-terrorism-clarification-act-2018>; see also Robbie Gramer & Colum Lynch, *U.S. Mulls End to Remaining Aid Programs for Palestinians*, FOR. POL’Y (Nov. 30, 2018), at <https://foreignpolicy.com/2018/11/30/new-law-could-end-u-s-aid-programs-to-the-palestinians-u-s-agency-for-international-development-terrorist-law-humanitarian-aid-united-nations-relief-works-agency-unrwa-west-bank-gaza-protests-trump-ku> (noting that the Trump administration has developed concerns about the effects of this law and may seek to amend it).

<sup>44</sup> Wong, *supra* note 42.

<sup>45</sup> *Wishing Away Palestinian Refugees: End of US’ UNRWA Aid Explained*, AL JAZEERA (Sept. 2, 2018), at <https://www.aljazeera.com/news/2018/09/unrwa-funding-cut-deeply-regrettable-shocking-180901071620633.html> (adding that “[t]his will fail”). The number of refugees is relevant to ongoing negotiations regarding a potential right of return, and Israel has been critical of UNRWA for how it defines refugees. *Id.*

<sup>46</sup> UNRWA Press Release, Open Letter from UNRWA Commissioner-General to Palestine Refugees and UNRWA Staff (Sept. 1, 2018), at <https://www.unrwa.org/newsroom/official-statements/open-letter-unrwa-commissioner-general-palestine-refugees-and-unrwa>.



## INTERNATIONAL ECONOMIC LAW

*NAFTA Is Renegotiated and Signed by the United States*

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A twenty-four-year-old agreement was reborn on October 1, 2018, when President Trump announced that the North American Free Trade Agreement (NAFTA) had been successfully renegotiated. The deal came after an arduous, year-long negotiation process that almost left Canada behind. As one indicator of its contentiousness, the deal lacks an agreed-upon name, but the United States is referring to it as the United States-Mexico-Canada Agreement (USMCA).<sup>1</sup> It keeps some key NAFTA provisions mostly the same, including with respect to state-to-state dispute resolution, but eliminates, modifies, and adds other provisions. Among the changes: investor-state dispute settlement has been eliminated as between the United States and Canada; rules of origin for automobiles and rules for U.S. dairy products have been modified; and new provisions address labor protections, intellectual property rights, rights for indigenous persons, rules for trade negotiations with non-market countries, and the agreement's termination. The agreement was formally signed by the leaders of all three countries on November 30, 2018. It must be approved through the domestic ratification procedures of the three countries before it enters into force.

Signed in 1992 by Canada, Mexico, and the United States, NAFTA went into effect in 1994 and lifted tariffs on many goods traded between the three countries.<sup>2</sup> It sought to build "an expanded and secure market for the goods and services produced in" the three countries and to "eliminate barriers to trade in, and facilitate the cross-border movement of, goods and services between" these countries.<sup>3</sup> Twenty-two years later during Trump's presidential campaign, he called NAFTA "the worst trade deal in history" and promised to renegotiate it.<sup>4</sup>

U.S. Trade Representative Robert Lighthizer began formal NAFTA renegotiations on August 16, 2017.<sup>5</sup> By November of that year, the United States, Canada, and Mexico had gone through five rounds of negotiations for an updated NAFTA, and strong disagreements remained over automobiles and a sunset clause, among others.<sup>6</sup> The United States wanted to increase the threshold for automobiles that needed to be manufactured in North America in order to qualify for zero tariffs from 62.5 percent to 85 percent, while Mexico and Canada thought these new rules of origin would be problematic.<sup>7</sup> The United States also demanded a

<sup>1</sup> Daniel Dale, *USMCA? CUSMA? What the New NAFTA is Called Depends on Who's Talking*, STAR (Nov. 30, 2018), at <https://www.thestar.com/news/world/2018/11/30/usmca-cusma-what-the-new-nafta-is-called-depends-on-whos-talking.html> (noting that Canadian leaders have described it as "the new NAFTA" and that Canada officially calls it the CUSMA, while Mexico terms it the T-MEC).

<sup>2</sup> North American Free Trade Agreement, Dec. 17, 1992, 32 ILM 289 [hereinafter NAFTA Text].

<sup>3</sup> *Id.* pmb., Art. 102(1)(a).

<sup>4</sup> *Full transcript: Donald Trump's Jobs Plan Speech*, POLITICO (June 28, 2016), at <https://www.politico.com/story/2016/06/full-transcript-trump-job-plan-speech-224891>.

<sup>5</sup> Office of the U.S. Trade Rep. Press Release, USTR Releases Updated NAFTA Negotiating Objectives (Nov. 2017), at <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2017/november/ustr-releases-updated-nafta#> [<https://perma.cc/HBM6-DB3A>].

<sup>6</sup> Ana Swanson & Elisabeth Malkin, *Nafta Round Closes with Talks Boggled Down by Conflict*, N.Y. TIMES (Nov. 21, 2017), at <https://nyti.ms/2hPJ5xG>.

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

sunset clause which would require that the agreement expire every five years unless all three countries agreed to renew.<sup>8</sup> During the course of negotiations, Trump threatened “that if [NAFTA] doesn’t work out, we’ll terminate it,” although his domestic legal authority to take such an act is not fully settled.<sup>9</sup> Negotiations continued into the spring and summer of 2018.<sup>10</sup>

In June 2018, Trump elaborated on why he thought the original NAFTA deal could not stand and introduced an alternative idea to the trilateral deal:

Well, NAFTA—look, it’s been a terrible deal for the United States. People are starting to see it. We lose over a hundred billion dollars a year with Mexico. We lose many, many, many billions of dollars with Canada. Canada doesn’t take—I mean, they’re very restrictive as to taking our agricultural product and other things.

...

... To be honest with you, I wouldn’t see NAFTA—I wouldn’t mind seeing NAFTA, where you’d go by a different name, where you make a separate deal with Canada and a separate deal with Mexico, because you’re talking about a very different two countries.<sup>11</sup>

Trade tensions continued to rise when Trump decided to impose 25 percent steel tariffs and 10 percent aluminum tariffs on Canada and Mexico, partly for the purpose of pressuring them to agree to U.S. negotiating demands.<sup>12</sup> Both countries imposed responsive tariffs and emphasized the need for a trilateral deal.<sup>13</sup> The rift in U.S.-Canadian relations deepened when Trump tweeted after leaving the G7 Conference that Trudeau was “[v]ery dishonest & weak.”<sup>14</sup>

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

<sup>9</sup> Donald J. Trump, Remarks on Signing Proclamations on Imports of Large Residential Washers and Certain Photovoltaic Cells and an Exchange with Reporters, 2018 DAILY COMP. PRES. DOC. NO. 43, at 2 (Jan. 23); see Jean Galbraith, Contemporary Practice of the United States, 112 AJIL 315, 321 n. 48 (noting the debates over Trump’s domestic legal authority to terminate NAFTA and over the extent to which such a termination would affect NAFTA’s implementing legislation).

<sup>10</sup> In the process, the negotiators overshot a May deadline given by the speaker of the House of Representatives for ensuring that any new deal would be voted on by the then-current Congress. See Jean Galbraith, Contemporary Practice of the United States, 112 AJIL 510, 512–13 (2018) (discussing these timing issues).

<sup>11</sup> Donald J. Trump, Remarks Following a Meeting with Vice Chairman of the State Affairs Commission Kim Yong Chol North Korea and an Exchange with Reporters, 2018 DAILY COMP. PRES. DOC. NO. 392, at 6 (June 1). The extent of the U.S. trade deficit or surplus with Canada is more complicated than Trump’s statement implied. See, e.g., Flora Carr, *President Trump Claims the United States Has a Trade Deficit with Canada. That’s Not So Clear*, TIME (Mar. 15, 2018), at <http://time.com/5185673/donald-trump-us-cananda-trade-deficit-surplus> (noting in response to a similar earlier statement by Trump that the United States runs a trade surplus with Canada if one discounts goods that are manufactured elsewhere in the world but pass through Canada on their way to the United States).

<sup>12</sup> Ana Swanson & Jim Tankersley, *Mexico, Hitting Back, Imposes Tariffs on \$3 Billion Worth of U.S. Goods*, N.Y. TIMES (June 5, 2018), at <https://nyti.ms/2xTW8Lp>. For discussion of other countries targeted by these tariffs, ongoing requests for World Trade Organization (WTO) consultations with respect to the tariffs and retaliatory measures, and U.S. domestic legal disputes concerning the tariffs, see Jean Galbraith, Contemporary Practice of the United States, 112 AJIL 751, 754–57 (2018).

<sup>13</sup> Swanson & Tankersley, *supra* note 12; Can. Dept. of Fin., Countermeasures in Response to Unjustified Tariffs on Canadian Steel and Aluminum Products, at <https://www.fin.gc.ca/access/tt-it/cacsap-cmpcaa-1-eng.asp> [<https://perma.cc/MTZ8-X8K6>] (last modified June 29, 2018); Anthony Harrup, *Mexico and Canada Are Committed to a Trilateral Deal*, WALL ST. J. (July 25, 2018), at <https://www.wsj.com/articles/mexico-and-canada-are-committed-to-a-trilateral-nafta-deal-1532545283>.

<sup>14</sup> Donald J. Trump (@realDonaldTrump), TWITTER (June 9, 2018, 7:04 PM), at <https://twitter.com/realDonaldTrump/status/1005586562959093760> [<https://perma.cc/SP3Y-GU3F>].

Early August brought in a new U.S. Department of Commerce announcement that it would proceed with tariffs on a Canadian newsprint exporter,<sup>15</sup> and the United States and Mexico began to make headway in negotiations without Canada.<sup>16</sup> This progress took place in light of the approaching end to President Enrique Peña Nieto's term on November 30, when he would be replaced by Andrés Manuel López Obrador.<sup>17</sup> Because U.S. congressional law effectively required Trump to give ninety days' notice before signing an agreement, any deal that would be signed by Peña Nieto before he left office needed to be announced by the end of August.<sup>18</sup>

After weeks of forward-moving negotiations, Trump announced on August 27 that the United States and Mexico had reached an agreement on key provisions, adding that he wanted to call it the "United States-Mexico Trade Agreement," due to the "bad connotation" associated with the NAFTA name.<sup>19</sup> Peña Nieto confirmed on a phone call with the White House that it was Mexico's wish "that now Canada will also be able to be incorporated in all this."<sup>20</sup> Trump responded during the call that "Canada will start negotiations shortly . . . and if they'd like to negotiate fairly, we'll do that."<sup>21</sup> The White House claimed after Trump's announcement that "[t]his is the first time that a modern United States trade agreement has been renegotiated."<sup>22</sup>

On August 31, Trump officially gave notice to Congress of his "intention to enter into a trade agreement with Mexico—and with Canada if it is willing."<sup>23</sup> As Mexico and the United States began to work to include Canada in the deal, it became unclear whether they would succeed. As part of its negotiating approach, Canada had earlier set forth four "progressive" goals of strong labor safeguards, provisions for gender equality, provisions for indigenous

<sup>15</sup> U.S. Dep't of Commerce Fact Sheet, Commerce Finds Dumping and Subsidization of Imports of Uncoated Groundwood Paper from Canada (Aug. 2, 2018), available at <https://enforcement.trade.gov/download/factsheets/factsheet-canada-uncoated-groundwood-paper-ad-cvd-final-080218.pdf> [<https://perma.cc/EN4G-33XF>]. These tariffs were not ultimately applied. Uncoated Groundwood Paper from Canada, Inv. Nos. 701-TA-584, 731-TA-1382, USITC Pub. 4822 (Sept. 2018) (Final).

<sup>16</sup> Ana Swanson, *United States and Mexico Are Nearing NAFTA Compromise*, N.Y. TIMES (Aug. 3, 2018), at <https://nyti.ms/2OagjYq>.

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

<sup>18</sup> *Id.*; see also 19 U.S.C. § 4205(a)(1)(A) (providing as a condition of the fast-track process for legislative approval that the president must notify Congress of his intention to sign a trade agreement ninety calendar days before doing so).

<sup>19</sup> Remarks During a Teleconference Call with President Enrique Peña Nieto of Mexico to Discuss the United States-Mexico Trade Agreement and an Exchange with Reporters, 2018 DAILY COMP. PRES. DOC. NO. 548, at 1 (Aug. 27).

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

<sup>21</sup> *Id.* at 2.

<sup>22</sup> White House Fact Sheet, President Donald J. Trump Is Keeping His Promise to Renegotiate NAFTA (Aug. 27, 2018), at <https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-keeping-promise-renegotiate-nafta> [<https://perma.cc/ZV8D-JGNF>]. In this preliminary agreement, Mexico and the United States reportedly agreed that at least 75% of an automobile's value would have to be manufactured in North America in order to qualify for zero tariffs and that 40–45% of the cars had to be made by workers earning \$16 an hour. Ana Swanson, Katie Rogers, & Alan Rappoport, *Trump Reaches Revised Trade Deal with Mexico, Threatening to Leave Out Canada*, N.Y. TIMES (Aug. 27, 2018), at <https://nyti.ms/2oe6sGn>. Instead of Trump's five-year sunset clause, the two countries reportedly also agreed to "a review of the trade pact every six years that would extend its lifetime for 16 more years." *Id.*

<sup>23</sup> Notice of Intention to Enter into a Trade Agreement, 83 Fed. Reg. 45191 (Aug. 31, 2018).

rights, and provisions for climate change.<sup>24</sup> The threat of potential U.S. tariffs on automobiles—an issue into which the Department of Commerce had opened an investigation in May<sup>25</sup>—was reportedly an important piece of negotiating leverage for the Trump administration.<sup>26</sup>

Hurried negotiations commenced. Trump took particular issue with Canada's 300 percent tariffs on dairy products,<sup>27</sup> while Trudeau stated that a “red line” for Canada was an independent dispute resolution system because Trump is “a president that doesn't always follow the rules as they're laid out.”<sup>28</sup> Although both leaders publicly asserted that they would be willing to walk away from any deal that did not meet their objectives,<sup>29</sup> Canada's Minister of Foreign Affairs, Chrystia Freeland, continued to meet with U.S. negotiators and reported that the atmosphere was “constructive and positive.”<sup>30</sup> Members of Congress remained vocal about their desire for a three-country agreement.<sup>31</sup>

After a fraught negotiating process, Canada, the United States, and Mexico finally agreed to a deal on October 1, allowing the text to be published sixty days before signature at the end of November.<sup>32</sup> Following the “legal scrub” of the agreement, the final text was signed on November 30 by the leaders of all three countries during a G-20 summit.<sup>33</sup> The text

<sup>24</sup> Chrystia Freeland, Minister of Foreign Affairs of Can., Address by Foreign Affairs Minister on the Modernization of the North American Free Trade Agreement (NAFTA) (Aug. 14, 2017), at [https://www.canada.ca/en/global-affairs/news/2017/08/address\\_by\\_foreignaffairsministeronthemodernizationofthenorthame.html](https://www.canada.ca/en/global-affairs/news/2017/08/address_by_foreignaffairsministeronthemodernizationofthenorthame.html).

<sup>25</sup> Jean Galbraith, *Contemporary Practice of the United States*, 112 AJIL 499, 504 (2018).

<sup>26</sup> Jack Ewing, Ana Swanson & Motoko Rich, *Specter of Trump's Car Tariffs Forces Allies to Give Ground in Talks*, N.Y. TIMES (Aug. 30, 2018), at <https://nyti.ms/2NxxDoz>.

<sup>27</sup> Remarks Prior to a Meeting with Amir Sabah al-Ahmad al-Jabir al-Sabah of Kuwait and an Exchange with Reporters, 2018 DAILY COMP. PRES. DOC. NO. 574, at 4 (Sept. 5).

<sup>28</sup> Alan Rappeport, *As Nafta Talks Resume, U.S. and Canada Aren't Budgeting on Key Priorities*, N.Y. TIMES (Sept. 5, 2018), at <https://nyti.ms/2CiMQdQ>.

<sup>29</sup> Trudeau stated that Canada would “walk away and not sign a deal rather than sign a bad deal for Canadians.” *Id.* Similarly, Trump tweeted “[t]here is no political necessity to keep Canada in the new NAFTA deal. If we don't make a fair deal for the U.S. after decades of abuse, Canada will be out. Congress should not interfere w/ these negotiations or I will simply terminate NAFTA entirely & we will be far better off. . . .” Donald J. Trump (@realDonaldTrump), TWITTER (Sept. 1, 2018, 11:03 AM):at <https://twitter.com/realDonaldTrump/status/1035905988682018816> [<https://perma.cc/ZG3M-FUUU>].

<sup>30</sup> Rappeport, *supra* note 28.

<sup>31</sup> As an example, Rep. Kevin Brady (R-Tex.) stated that “[e]veryone's desire is for this to be a three-country agreement.” David J. Lynch, Damian Paletta & Erica Werner, *U.S. All but Certain to Miss Weekend Deadline to Include Canada in Three-Way NAFTA Deal*, WASH. POST (Sept. 25, 2018), at [https://www.washingtonpost.com/business/economy/us-all-but-certain-to-miss-weekend-deadline-to-include-canada-in-three-way-nafta-deal/2018/09/25/08fc600c-c0d4-11e8-90c9-23f963eea204\\_story.html?utm\\_term=.2811af7fab39](https://www.washingtonpost.com/business/economy/us-all-but-certain-to-miss-weekend-deadline-to-include-canada-in-three-way-nafta-deal/2018/09/25/08fc600c-c0d4-11e8-90c9-23f963eea204_story.html?utm_term=.2811af7fab39). Senator Ron Wyden (D-Or.) remarked that “[i]t would be a monumental mistake to do this without Canada.” Alan Rappeport & Jim Tankersley, *Congress Uneasy as Trump Moves to Revise Nafta Without Canada*, N.Y. TIMES (Sept. 27, 2018), at <https://nyti.ms/2NLKNV5>.

<sup>32</sup> White House Fact Sheet, President Donald J. Trump Secures a Modern, Rebalanced Trade Agreement with Canada and Mexico (Oct. 1, 2018), at <https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-secures-modern-rebalanced-trade-agreement-canada-mexico> [<https://perma.cc/CM6U-WB44>]; see also 19 U.S.C. § 4205(a)(1)(B) (providing as a condition of the fast-track process for legislative approval that the president must publish the text of the agreement sixty days before signing it).

<sup>33</sup> Dan Bilefsky, *Trade Pact Is Signed at G-20, but Rift Remains for Trump and Trudeau*, N.Y. TIMES (Nov. 30, 2018), at <https://www.nytimes.com/2018/11/30/world/europe/usmca-trump-justin-trudeau.html>; see also Franz Christian Ebert & Pedro A. Villarreal, *The Renegotiated “NAFTA”: What Is in It for Labor Rights*, EJIL: TALK! (Oct. 11, 2018), at <https://www.ejiltalk.org/category/international-labour-law> (noting after the earlier release of the preliminary text that “extensive legal ‘scrubbing’ lay ahead”).

ultimately contained thirty-four chapters, four separate annexes, and thirteen side-letters.<sup>34</sup> It made some alterations, deletions, and additions to the original NAFTA, while keeping other terms the same. Some provisions mirrored language from the Trans-Pacific Partnership (TPP), a multilateral trade agreement that the Obama administration had negotiated but which Trump chose to withdraw the United States from rather than seek congressional approval for ratification.<sup>35</sup> The agreement provisions did not resolve all ongoing trade disputes. Notably, U.S. aluminum and steel tariffs on Canada and Mexico remained in place<sup>36</sup> along with Canada's and Mexico's respective retaliatory tariffs.<sup>37</sup>

Regarding a sunset provision, the USMCA settled on a sixteen-year agreement that would be up for review every six years.<sup>38</sup> At the end of each six-year period,

[E]ach Party shall confirm, in writing, through its head of government, if it wishes to extend the term of this Agreement for another 16-year period. If each Party confirms its desire to extend this Agreement, the term of this Agreement shall be automatically extended for another 16 years and the Commission shall conduct a joint review and consider extension of this Agreement term no later than at the end of the next six-year period.<sup>39</sup>

If a party does not confirm its wish to extend the deal for another sixteen years, then the parties must review the agreement each year for the remainder of the sixteen-year term.<sup>40</sup> Separate from the termination provision, the agreement also allows for a party to withdraw from the agreement six months after it provides written notice to the other parties, allowing the agreement to remain in place with respect to the other two countries.<sup>41</sup>

Several of Canada's progressive goals were reflected in the negotiated agreement. Regarding indigenous rights, which were not previously addressed in NAFTA, the USMCA reads:

<sup>34</sup> Office of the U.S. Trade Rep., United States-Mexico-Canada Agreement Text, at <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between> [hereinafter USMCA Text]. The draft text reached in October had contained one fewer side letter. See <https://perma.cc/4PEB-TTJR> (archiving the table of contents for this draft text).

<sup>35</sup> See, e.g., Anupam Chander, *The Coming North American Digital Trade Zone*, CFR (Oct. 9, 2018), at <https://www.cfr.org/blog/coming-north-american-digital-trade-zone> (noting that "USMCA negotiators used the TPP's electronic commerce chapter as the basis for negotiations" on various issues related to the digital economy).

<sup>36</sup> Trump remarked that steel and aluminum tariffs on Canada and Mexico would remain in place "[u]ntil such time as we can do something that would be different—like quotas, perhaps . . ." Remarks on the United States-Mexico-Canada Agreement and an Exchange with Reporters, 2018 DAILY COMP. PRES. DOC. NO. 656, at 12-13 (Oct. 1) [hereinafter Remarks on the USMCA].

<sup>37</sup> Rebecca Joseph, *Steel Tariffs "Staying" Despite New Trade Deal: Trump*, GLOB. NEWS (Oct. 1, 2018), at <https://globalnews.ca/news/4504147/donald-trump-steel-tariffs-usmca>.

<sup>38</sup> USMCA Text, *supra* note 34, Art. 34.7.

<sup>39</sup> *Id.* Art. 34.7, para. 3; see also <https://perma.cc/7XUV-TT37> (archiving the almost identical draft text). The language here is not entirely clear as to whether the 16-year period that is generated by an agreement to renew at the six-year mark is *in addition* to the remaining ten years of the agreement or instead a *substitute* for it. Canada has used the term "rolling 16-year period" to describe this provision. Canada-United States-Mexico Agreement (CUSMA): Review and Ongoing Modernization Provision Summary, at <https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cusma-aceum/modernization-modernisation.aspx?lang=eng> (last modified Nov. 29, 2018).

<sup>40</sup> *Id.* Art. 34.7, para. 4.

<sup>41</sup> *Id.* Art. 34.6. This is almost the same language as the withdrawal provision in NAFTA. See NAFTA Text, *supra* note 2, Art. 2205.



Provided that such measures are not used as a means of arbitrary or unjustified discrimination against persons of the other Parties or as a disguised restriction on trade in goods, services, and investment, this Agreement does not preclude a Party from adopting or maintaining a measure it deems necessary to fulfill its legal obligations to indigenous peoples.<sup>42</sup>

Also going beyond the original NAFTA, the USMCA seeks to eliminate workplace discrimination based on sexual orientation and gender identity:

The Parties recognize the goal of eliminating discrimination in employment and occupation, and support the goal of promoting equality of women in the workplace. Accordingly, each Party shall implement policies that it considers appropriate to protect workers against employment discrimination on the basis of sex (including with regard to sexual harassment), pregnancy, sexual orientation, gender identity, and caregiving responsibilities; provide job-protected leave for birth or adoption of a child and care of family members; and protect against wage discrimination.<sup>43</sup>

A footnote to this provision states that “[t]he United States’ existing federal agency policies regarding the hiring of federal workers are sufficient to fulfill the obligations set forth in this Article.”<sup>44</sup>

The agreement also heeds Canada’s request to keep an independent state-to-state dispute resolution process.<sup>45</sup> As one commentator has pointed out, the provisions for choosing panelists in a dispute remain largely unchanged from NAFTA and are similar to the panelist provisions drafted in the TPP.<sup>46</sup> Although state-to-state dispute mechanisms are mostly left intact, the new deal eliminates investor-state dispute settlement (ISDS) for Canada.<sup>47</sup> It maintains

<sup>42</sup> USMCA Text, *supra* note 34, Art. 32.5; *see also* <https://perma.cc/324H-EMT7> (archiving the quite similar draft text). The agreement also contains provisions concerning protection of non-national migrant workers. *Id.* Art. 23.8.

<sup>43</sup> *Id.* Art. 23.9; *see also* <https://perma.cc/3CMM-BF2H> (archiving the draft text, which used more emphatic language). NAFTA did not provide any chapter for labor provisions, NAFTA Text, *supra* note 2, but was supplemented with the North American Agreement on Labor Cooperation (NAALC). North American Agreement on Labor Cooperation, Nov. 1, 1993, 32 ILM 1499. The NAALC included a “guiding principle” that the parties should promote the “[e]limination of employment discrimination on such grounds as race, religion, age, sex or other grounds . . . .” *Id.* at Annex 1, para. 7. The TPP labor chapter does not provide similar provisions. *See* Office of the U.S. Trade Rep., TPP Full Text, at ch. 19, at <https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text> [<https://perma.cc/BG7H-J3ZM>] [hereinafter TPP Text].

<sup>44</sup> USMCA Text, *supra* note 34, Art. 23.9. This footnote was added during the legal scrub, having been absent from the original draft text. *See* <https://perma.cc/3CMM-BF2H> (archiving the draft text).

<sup>45</sup> USMCA Text, *supra* note 34, at ch. 31.

<sup>46</sup> Simon Lester, *The U.S.-Mexico-Canada (AKA the New NAFTA) Trade Deal: State-State Dispute Settlement*, INT’L L. & ECON. POL’Y (Oct. 2, 2018), at <https://worldtradelaw.typepad.com/ielpblog/2018/10/the-us-mexico-canada-and-nafta-trade-deal-state-state-dispute-settlement.html>; Simon Lester, *Panel Appointments and Rosters in the New NAFTA*, INT’L L. & ECON. POL’Y (Oct. 26, 2018), at <https://worldtradelaw.typepad.com/ielpblog/2018/10/panel-appointment-and-rosters-in-the-new-nafta.html>.

<sup>47</sup> IAN F. FERGUSSON & M. ANGELES VILLARREAL, CONG. RESEARCH SERV., IF10997, PROPOSED U.S.-MEXICO-CANADA (USMCA) TRADE AGREEMENT 1 (2018); *cf.* TPP Text, *supra* note 43, Art. 9.18–.30 [<https://perma.cc/H54L-5NTE>] (including some provisions on ISDS). When Trump withdrew from the TPP, the other TPP Parties, including Canada and Mexico, negotiated a new agreement without the United States which incorporated many of the original TPP provisions. Gov. Can., Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), at <http://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cptpp-ptppg/text-texte/index.aspx?lang=eng> [<https://perma.cc/2S9A-LA69>] (last modified Mar. 3, 2018). When the CPTPP enters into force, it will allow for some ISDS between Canada and Mexico, although its terms on ISDS are effectively more limited than were those in the original TPP. *Id.* Art. 2 & Annex [<https://perma.cc/2S9A-LA69>].



ISDS “only between the United States and Mexico for claimants regarding government contracts in the oil, natural gas, power generation, infrastructure, and telecommunications sectors; and maintain[s] U.S.-Mexico ISDS in other sectors provided the claimant exhausts national remedies first.”<sup>48</sup>

With regard to automobiles, the three countries agreed that 75 percent of every automobile must be made in North America in order to qualify for duty-free treatment.<sup>49</sup> The agreement also provides that up to 40 percent of automobile parts manufactured for vehicles receiving duty-free treatment must come from factories paying workers at least \$16 an hour.<sup>50</sup> Additionally, the new agreement contains a chapter covering intellectual property rights among the three countries, which includes ten years of data protection for biological drugs, and standards against the circumvention of technological protection measures for digital works.<sup>51</sup>

Trump announced that the agreement was “the most important trade deal we’ve ever made by far,” remarking:

It’s my great honor to announce that we have successfully completed negotiations on a brandnew [sic] deal to terminate and replace NAFTA and the NAFTA trade agreements with an incredible new U.S.-Mexico-Canada Agreement, called “USMCA.”

...

I have to, certainly, give my highest regards to Prime Minister of Canada, Justin Trudeau. A lot of stories came out about Justin and I having difficulty together, and we did over the trade deal. But I’ll tell you, it’s turned out to be a very, very good deal for both; and a very, very good deal for all three. It puts us in a position that we’ve never been in before.

...

Once approved by Congress, this new deal will be the most modern, up-to-date, and balanced trade agreement in the history of our country, with the most advanced protections for workers ever developed. . . . Likewise, it will be the most advanced trade deal in the world with ambitious provisions on the digital economy, patents—very important—financial services, and other areas where the United States has a strong competitive advantage. . . .<sup>52</sup>

perma.cc/34QY-6LLJ] (providing that certain TPP provisions related to ISDS are suspended “until the Parties agree to end suspension”); *see also* Can. Gov., Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) – Frequently Asked Questions: What Specific Improvements Did Canada Seek in the CPTPP?, at <https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cptpp-ptppg/faq.aspx?lang=eng> (last modified Oct. 25, 2018) (“Canada secured important suspensions to limit the scope of investor-state dispute settlement (ISDS) provisions.”).

<sup>48</sup> FERGUSSON & VILLARREAL, *supra* note 47; USMCA Text, *supra* note 34, at ch. 14, Annex 14-D [<https://perma.cc/AJP3-P57R>].

<sup>49</sup> USMCA Text, *supra* note 34, at ch. 4 (also setting forth a phase-in period and certain further specifications); Remarks on the USMCA, *supra* note 36, at 3.

<sup>50</sup> USMCA Text, *supra* note 34, at ch. 4, Annex Art. 4-B.7; Jim Tankersley, *Trump Just Ripped Up NAFTA. Here’s What’s in the New Deal.*, N.Y. TIMES (Oct. 1, 2018), at <https://nyti.ms/2OsZvQq>.

<sup>51</sup> USMCA Text, *supra* note 34, at ch. 20. For more information about the new intellectual property provisions, see Office of the U.S. Trade Rep. Fact Sheet, United States–Mexico–Canada Trade Fact Sheet: Modernizing NAFTA into a 21st Century Trade Agreement (Oct. 2018), at <https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/2018/october/united-states%E2%80%93mexico%E2%80%93canada-trade-fa-1> [<https://perma.cc/A5ZB-MTMV>].

<sup>52</sup> Remarks on the USMCA, *supra* note 36, at 1-2.

For Canada, the agreement did require one big concession: allowing U.S. dairy access up to 3.59 percent of Canada's dairy market; however, this concession is only slightly higher than what the United States and Canada had agreed to under the TPP.<sup>53</sup> Trudeau responded that dairy producers will be compensated for their losses, but that Canada is "in a much more stable place than it was yesterday."<sup>54</sup>

Another notable provision in the USMCA that did not appear in NAFTA concerns free trade agreements with a "non-market" country, defined as a country that "on the date of signature of this Agreement, a Party has determined to be a non-market economy for purposes of its trade remedy laws" and as to which "no Party has signed a free trade agreement."<sup>55</sup> The USMCA requires that "[a]t least 3 months prior to commencing negotiations, a Party shall inform the other Parties of its intention to commence free trade negotiations with a non-market country."<sup>56</sup> The USMCA further requires various information-sharing in the event of such negotiations and explicitly provides that entry into a free trade agreement with a non-market country constitutes grounds for the other parties to terminate the USMCA on six months notice with respect to that party.<sup>57</sup> This "non-market" country provision is thought to have been written with China in mind.<sup>58</sup>

By the terms of an accompanying protocol, the USMCA will enter into force "on the first day of the third month" after all three countries have notified each other that they have "completed the internal procedures" needed for entry into force.<sup>59</sup> For the United States, these procedures will require submission of the USMCA to Congress and the subsequent passage of implementing legislation.

<sup>53</sup> USMCA Text, *supra* note 34, at ch. 2; FERGUSSON & VILLARREAL, *supra* note 47 (explaining increase in access to Canadian dairy market); Rod Nickel, *Canada Dairy Farmers Content As TPP Deal Keeps System Intact*, REUTERS (Oct. 5, 2015), at <https://www.reuters.com/article/us-trade-tpp-canada-farming-idUSKCN0RZ25E20151005> (noting that the TPP had provided the United States and other TPP countries access to 3.25% of Canada's dairy market).

<sup>54</sup> Selena Ross, *With New Trade Deal, Canada Avoids a Doomsday Scenario. But Is It a Win?*, WASH. POST (Oct. 1, 2018), at [https://www.washingtonpost.com/world/the\\_americas/with-new-trade-deal-canada-avoids-a-doomsday-scenario-but-is-it-a-win/2018/10/01/304d7968-c5a0-11e8-9c0f-2ffaf6d422aa\\_story.html?utm\\_term=.24e084d6e264](https://www.washingtonpost.com/world/the_americas/with-new-trade-deal-canada-avoids-a-doomsday-scenario-but-is-it-a-win/2018/10/01/304d7968-c5a0-11e8-9c0f-2ffaf6d422aa_story.html?utm_term=.24e084d6e264).

<sup>55</sup> USMCA Text, *supra* note 34, Art. 32.10(1). For the earlier draft text of Article 32.10, see <https://perma.cc/324H-EMT7> (archiving this draft text).

<sup>56</sup> *Id.* Art. 32.10(2).

<sup>57</sup> *Id.* Art. 32.10(3)–(8).

<sup>58</sup> See, e.g., Chad P. Brown, *The 5 Surprising Things About the New USMCA Trade Agreement*, WASH. POST (Oct. 9, 2018), at [https://www.washingtonpost.com/news/monkey-cage/wp/2018/10/09/the-5-surprising-things-about-the-new-usmca-trade-agreement/?noredirect=on&utm\\_term=.ce0fffd71871](https://www.washingtonpost.com/news/monkey-cage/wp/2018/10/09/the-5-surprising-things-about-the-new-usmca-trade-agreement/?noredirect=on&utm_term=.ce0fffd71871) ("Article 32.10 signals the consequences of negotiating a potential free-trade agreement with any nonmarket economies—that is a code word for 'China'"); David Lawder, *Trade Pact Clause Seen Deterring China Trade Deal with Canada, Mexico*, REUTERS (Oct. 3, 2018), at <https://www.reuters.com/article/us-trade-nafta-china/trade-pact-clause-seen-deterring-china-trade-deal-with-canada-mexico-idUSKCN1MC305> ("The clause, which has stirred controversy in Canada, fits in with U.S. President Donald Trump's efforts to isolate China economically and prevent Chinese companies from using Canada or Mexico as a 'back door' to ship products tariff-free to the United States.").

<sup>59</sup> Protocol Replacing the North American Free Trade Agreement with the Agreement Between the United States of America, the United Mexican States, and Canada, at [https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/Text/USMCA\\_Protocol.pdf](https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/Text/USMCA_Protocol.pdf) (further providing that entry into force shall have the effect of superseding NAFTA (except as incorporated into the USMCA) and shall trigger the termination of the North American Agreement on Labor Cooperation); see also USMCA Text, *supra* note 34, Art. 34.5 (cross-referencing the Protocol). The draft text of the USMCA set similar timing rules for the entry into force but did not rely on a separate protocol. See <https://perma.cc/7XUV-TT37> (archiving the draft text).

Pursuant to the Bipartisan Congressional Trade Priorities and Accountability Act of 2015,<sup>60</sup> the president must submit the “final legal text” of the agreement and a “draft statement of any administrative action proposed to implement the agreement” to Congress at least thirty days before submitting an implementing bill.<sup>61</sup> Once the implementing bill is submitted (and in the absence of specified mechanisms for disapproval), it will receive an up-or-down vote in both the House or the Senate within several months.<sup>62</sup> As of December 11, 2018, President Trump had not yet made the submission to Congress.

Viewing the agreement as a success, Lighthizer outlined three pillars of trade negotiation that he believes the USMCA provides a model for in the future:

The first pillar is fairness. We have negotiated stronger rules of origin for automobiles, which will bring billions of dollars of manufacturing back to America. We have secured greater market access for our farmers and ranchers. We’ve agreed to unprecedented labor standards that will help level the playing field for our workers. We’ve also agreed to a first-of-its-kind review and termination provision, which will ensure that the USMCA, unlike NAFTA, will not become unbalanced and out of date.

The second pillar will consist of a host of ambitious provisions on digital trade; intellectual property; services, including financial services, designed to protect our competitive edge.

The third pillar consists of new provisions designed to eliminate unfair trade practices, including strong new disciplines on state-owned enterprises, on currency manipulation, relations with nonmarket economies, and much, much more.<sup>63</sup>

The new USMCA was not the only progress in trade that Trump has recently achieved, and he has stated that he expects to “top it with China or EU or something.”<sup>64</sup> On September 24, 2018, Trump and President Moon Jae-In of South Korea issued a joint statement announcing that they had reached a negotiated agreement “to improve the United States-[South] Korea Free Trade Agreement,” solidifying an understanding reached the prior spring.<sup>65</sup> Also in September, Japan agreed to begin negotiating a bilateral trade agreement with the

<sup>60</sup> Bipartisan Congressional Trade Priorities and Accountability Act of 2015, Pub. L. No. 114-26, 129 Stat. 320 (codified at 19 U.S.C. §§ 4201–10).

<sup>61</sup> 19 U.S.C. § 4205(a)(1)(D)–(E). Prior to submitting the implementing legislation to Congress, the executive branch typically consults with the House Ways and Means Committee and the Senate Finance Committee on the content of this legislation through what is known as the “mock markup” process. IAN F. FERGUSSON & CHRISTOPHER M. DAVIS, CONG. RESEARCH SERV., R43491, TRADE PROMOTION AUTHORITY (TPA): FREQUENTLY ASKED QUESTIONS 25–26 (Sept. 4, 2018).

<sup>62</sup> 19 U.S.C. § 2191 (setting out the process, which allows for up to forty-five days for the implementing legislation to be in committee and another fifteen days for the floor vote to occur, with only days that the chamber is in session counting for these timing purposes); see also FERGUSSON & DAVIS, *supra* note 61, at 24–25 (discussing mechanisms for disapproval by which this process can be altered).

<sup>63</sup> Remarks on the USMCA, *supra* note 36, at 8.

<sup>64</sup> Donald J. Trump, Remarks on the United States-Mexico-Canada Agreement and an Exchange with Reporters Prior to Departure for Philadelphia, Pennsylvania, 2018 DAILY COMP. PRES. DOC. NO. 660, at 1 (Oct. 2).

<sup>65</sup> White House Press Release, Joint Statement on the United States-Korea Free Trade Agreement (Sept. 24, 2018), at <https://www.whitehouse.gov/briefings-statements/joint-statement-united-states-korea-free-trade-agreement> [<https://perma.cc/K4FB-RRPG>]; see also Galbraith, *supra* note 10, at 510–12 (discussing the preliminary renegotiation reached in the spring of 2018).

United States, after almost two years of declining to do so.<sup>66</sup> On October 16, Trump sent notification letters to Congress that he would enter new negotiations with the EU, Japan, and the UK—a process that he began with Canada and Mexico approximately one year before completing the NAFTA renegotiations that resulted in the USMCA.<sup>67</sup> As for China, following a major wave of tariffs and counter-tariffs, the status of negotiations remained far from clear as 2018 drew towards its close.<sup>68</sup> In early December, the two countries agreed not to impose further new tariffs during a ninety-day window in which further negotiations would be conducted.<sup>69</sup>

#### INTERNATIONAL HUMAN RIGHTS AND HUMANITARIAN LAW

*Congress Signals Concern Over U.S. Role in Aiding Saudi Arabia's Activities in Yemen*  
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As the conflict in Yemen continues, congressional concern over U.S. support for the Saudi-led coalition fighting in the region has grown.<sup>1</sup> The objects of these concerns include thousands of civilian casualties, a cholera epidemic, and a country on the brink of famine.<sup>2</sup> In October 2018, relations between the United States and Saudi Arabia became further complicated by the brutal death of Jamal Khashoggi, a prominent journalist and outspoken critic of the Saudi government.<sup>3</sup>

Since 2011, the United States has carried out counterterrorism operations in Yemen aimed at Al Qaeda in the Arabian Peninsula (AQAP) and later also at the Islamic State of Iraq and the Levant (ISIL).<sup>4</sup> As grounds under domestic law for these military actions, the United States

<sup>66</sup> Motoko Rich, *Japan's Embrace of Bilateral Trade Talks with U.S. Spares It from Tariffs*, N.Y. TIMES (Sept. 27, 2018), at <https://nyti.ms/2N1AYay> (noting Japan's concern that the United States might impose tariffs on imported cars).

<sup>67</sup> White House Press Release, Remarks by President Trump in a Cabinet Meeting (Oct. 17, 2018), at <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-cabinet-meeting-11> [<https://perma.cc/Z768-QVCM>].

<sup>68</sup> Glenn Thrush, *Trump Trade Adviser Warns That There Will Be No Quick Deal with China*, N.Y. TIMES (Nov. 9, 2018), at <https://www.nytimes.com/2018/11/09/us/politics/peter-navarro-china-trade.html>; see also Galbraith, *supra* note 12, at 751–53 (describing the wide-ranging tariffs and counter-tariffs imposed by China and the United States in the summer and fall of 2018 and the related WTO requests for consultations).

<sup>69</sup> Keith Bradsher & Alan Rappeport, *U.S.-China Trade Truce Gives Both Sides Political Breathing Room*, N.Y. TIMES (Dec. 2, 2018), at <https://www.nytimes.com/2018/12/02/business/trade-truce-china-us.html>.

<sup>1</sup> See CHRISTOPHER M. BLANCHARD & JEREMY M. SHARP, CONG. RESEARCH SERV., R45046, *THE WAR IN YEMEN: A COMPILATION OF LEGISLATION IN THE 115TH CONGRESS 5–7* (2018), available at <https://fas.org/sgp/crs/mideast/R45046.pdf> [<https://perma.cc/9BFH-Y2QD>].

<sup>2</sup> See generally Situation of Human Rights in Yemen, Including Violations and Abuses Since September 2014, Rep. of the H.R.C., UN Doc. A/HRC/39/43 (2018) [hereinafter Situation of Human Rights in Yemen].

<sup>3</sup> See Mark Landler & Edward Wong, *Trump Says Saudi Account of Khashoggi Killing Is "Worst Cover-Up" in History*, N.Y. TIMES (Oct. 23, 2018), at <https://www.nytimes.com/2018/10/23/us/politics/khashoggi-cover-up-trump.html> (discussing how the killing of Khashoggi is causing tension between Saudi Arabia and the United States, including with respect to arms sales).

<sup>4</sup> Oona Hathaway, Alexandra Francis, Aaron Haviland, Srinath Reddy Kethireddy & Alyssa Yamamoto, *The Yemen Crisis and the Law: The Saudi-Led Campaign and U.S. Involvement*, JUST SECURITY (Feb. 20, 2018), at <https://www.justsecurity.org/52718/js-yemen-crisis-forum-saudi-campaign-us-involvement>.

continues to rely upon Congress's 2001 Authorization for the Use of Military Force against groups responsible for the terrorist attacks on September 11, 2001.<sup>5</sup> At the international level, the internationally recognized government of Yemen has consented to these operations.<sup>6</sup> In December 2017, U.S. Central Command acknowledged that "U.S. forces have conducted multiple ground operations and more than 120 strikes in 2017" against AQAP and ISIL in Yemen.<sup>7</sup> As of November 6, 2018, it reported thirty-six air strikes for the year to date.<sup>8</sup>

Separate from its own military operations, the United States has supported the Saudi-led campaign against the Houthi movement in Yemen.<sup>9</sup> In March 2015, President Obama "authorized the provision of logistical and intelligence support" and established a planning mechanism "with Saudi Arabia to coordinate U.S. military and intelligence support."<sup>10</sup> This assistance included refueling for warplanes and targeting information, but not direct military involvement in the conflict.<sup>11</sup> The following year, the Obama administration began to review and scale back U.S. assistance to the coalition due to concern over the high rate of civilian casualties.<sup>12</sup> It also began emphasizing the need for a political settlement to the conflict.<sup>13</sup> By December 2016, the Obama administration had decreased the number of personnel working with the coalition in Riyadh and deferred the planned sale of

<sup>5</sup> *Id.*; see also Letter from Charles Faulkner, U.S. Dep't of State Bureau of Legis. Aff. to Senator Bob Corker, Chairman, Senate Committee on Foreign Rel. (Aug. 2, 2017), available at <https://www.politico.com/f/?id=0000015d-a3bf-d43a-a3dd-b3bf14170000> [<https://perma.cc/UB3A-ZSCH>].

<sup>6</sup> Kristina Daugirdas & Julian Davis Mortenson, Contemporary Practice of the United States, 111 AJIL 523, 526 & n. 30 (2017) (discussing the "complicated" nature of this consent in light of the fact that Yemen's internationally recognized government is effectively in exile); see also REPORT ON THE LEGAL AND POLICY FRAMEWORKS GUIDING THE UNITED STATES' USE OF MILITARY FORCE AND RELATED NATIONAL SECURITY OPERATIONS 6 (Mar. 2018), available at <https://assets.documentcloud.org/documents/4411804/3-18-War-Powers-Transparency-Report.pdf> (stating that "[a]s a matter of international law, we note that the airstrikes against ISI[L] have been conducted with the consent of the Government of Yemen in the context of its armed conflict against ISI[L] and also in furtherance of U.S. national self-defense"); Cf. David E. Sanger & Eric Schmitt, *Yemen Withdraws Permission for U.S. Antiterror Ground Missions*, N.Y. TIMES (Feb. 7, 2017), at <https://www.nytimes.com/2017/02/07/world/middleeast/yemen-special-operations-missions.html> (reporting that, following a raid that led to the death of Yemeni children and a U.S. servicemember, Yemen withdrew its permission for the United States to conduct ground attacks but left in place its acceptance of U.S. drone strikes).

<sup>7</sup> U.S. Cent. Comm. Press Release, Update on Recent Counterterrorism Strikes in Yemen (Dec. 20, 2017), at <http://www.centcom.mil/MEDIA/PRESS-RELEASES/Press-Release-View/Article/1401383/update-on-recent-counterterrorism-strikes-in-yemen> [<https://perma.cc/2JQW-9ALE>].

<sup>8</sup> U.S. Cent. Comm. Press Release, CENTCOM Updates Counterterrorism Strikes in Yemen (Nov. 6, 2018), at <http://www.centcom.mil/MEDIA/PRESS-RELEASES/Press-Release-View/Article/1683907/centcom-updates-counterterrorism-strikes-in-yemen> [<https://perma.cc/BL4A-5PEQ>].

<sup>9</sup> See Hathaway, Francis, Haviland, Kethireddy & Yamamoto, *supra* note 4 (elaborating on these issues and also noting that the Houthis are deemed to be supported by Iran).

<sup>10</sup> White House Press Release, Statement by NSC Spokesperson Bernadette Meehan on the Situation in Yemen (Mar. 25, 2015), at <https://obamawhitehouse.archives.gov/the-press-office/2015/03/25/statement-nsc-spokesperson-bernadette-meehan-situation-yemen>; cf. Daugirdas & Mortenson, *supra* note 6, at 531–33 (discussing circumstances under which U.S. aid to the Saudi military campaign might violate international law); Oona Hathaway, Alexandra Francis, Aaron Haviland, Srinath Reddy Kethireddy & Alyssa Yamamoto, *Yemen: Is the U.S. Breaking the Law?*, \_\_\_ HARV. NAT'L SEC. L.J. \_\_\_ (forthcoming 2019), available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3272263](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3272263) (analyzing the legality of U.S. involvement in Yemen under both international and domestic law).

<sup>11</sup> Daugirdas & Mortenson, *supra* note 6, at 523.

<sup>12</sup> *Id.* at 529.

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



about \$350 million dollars' worth of precision guided munitions.<sup>14</sup> Refueling assistance remained in effect, however, and some arms sales continued.<sup>15</sup>

After taking office, President Trump continued and enhanced the Obama administration's facilitation of the Saudi-led campaign. During his trip to Riyadh in May 2017, he approvingly described the "strong action against Houthi militants in Yemen" as a "significant contribution[] to regional security" on the part of Saudi Arabia and its coalition.<sup>16</sup> He announced an arms deal with the kingdom worth \$110 billion, saying it would "help the Saudi military to take a greater role in security operations."<sup>17</sup> This deal included the sale of precision-guided munitions.<sup>18</sup>

In June 2017, the Senate rejected a proposal to block the sale of \$500 million in precision-guided munitions, by a vote of 53–47.<sup>19</sup> Senators Rand Paul, Chris Murphy, and Al Franken, the resolution's sponsors, sought to prohibit the transaction because they believe the coalition to be using these weapons to target civilians.<sup>20</sup> After the vote, Senator Murphy tweeted: "My resolution halting \$500m of Saudi arms sale failed 47–53. But twenty more votes than similar resolution last fall. Strong message to Saudis."<sup>21</sup> This narrowing margin signaled growing concern over the Saudi-led coalition's actions in Yemen and the rising number of civilian casualties. The Trump administration, however, stated that providing the coalition with such munitions was necessary to help it avoid hitting civilians and noted that the sale would be accompanied by training aimed at reducing civilian casualties.<sup>22</sup>

In August 2018, Congress took action with the passage of the National Defense Authorization Act for Fiscal Year 2019 (NDAA).<sup>23</sup> The act contains multiple provisions that bear on the humanitarian crisis in Yemen and on civilian casualties more generally. Most notably, the Senate Armed Services committee incorporated an earlier proposed joint

<sup>14</sup> *Id.* at 529–30.

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

<sup>16</sup> Donald J. Trump, Remarks at the Arab Islamic American Summit in Riyadh, Saudi Arabia, 2017 DAILY COMP. PRES. DOC. NO. 350 at 4 (May 21).

<sup>17</sup> *Id.* at 2. For other aspects of the Trump administration's support for the Saudi-led coalition, see BLANCHARD & SHARP, *supra* note 1, at 2–4.

<sup>18</sup> Mark Landler, Eric Schmitt & Matt Apuzzo, *\$110 Billion Weapons Sale to Saudis Has Jared Kushner's Personal Touch*, N.Y. TIMES (May 18, 2017), at <https://www.nytimes.com/2017/05/18/world/middleeast/jared-kushner-saudi-arabia-arms-deal-lockheed.html?module=inline>.

<sup>19</sup> S. Res. 42, 115th Cong. (2017); 163 CONG. REC. S100, 3427–28 (daily ed. June 13, 2017); see also Anne Gearan, *Symbolic Effort to Block Part of Saudi Arms Sale Falls Short in the Senate*, WASH. POST (June 13, 2017), at [https://www.washingtonpost.com/world/national-security/symbolic-effort-to-block-part-of-saudi-arms-sale-falls-short-in-the-senate/2017/06/13/d68944f8-506a-11e7-b064-828ba60fbb98\\_story.html?utm\\_term=.22fe01b8f3b0](https://www.washingtonpost.com/world/national-security/symbolic-effort-to-block-part-of-saudi-arms-sale-falls-short-in-the-senate/2017/06/13/d68944f8-506a-11e7-b064-828ba60fbb98_story.html?utm_term=.22fe01b8f3b0).

<sup>20</sup> Gearan, *supra* note 19.

<sup>21</sup> Chris Murphy (@ChrisMurphyCT), TWITTER (June 13, 2017, 12:09 PM), at <https://twitter.com/ChrisMurphyCT/status/874705391371911168>.

<sup>22</sup> Eric Schmitt, *Saudi Arabia Tries to Ease Concerns Over Civilian Deaths in Yemen*, N.Y. TIMES (June 14, 2017), at <https://www.nytimes.com/2017/06/14/world/middleeast/saudi-arabia-arms-training-yemen.html>. A year later, the Trump administration submitted the sale of more than 120,000 precision-guided munitions to the coalition for congressional review, again arguing that precision-guided munitions reduce the risk of civilian casualties. Patricia Zengerle, *Pompeo Says Precision-Guided Missiles, as in Yemen, Cut Risks to Civilians*, REUTERS (May 23, 2018), at <https://www.reuters.com/article/us-usa-pompeo-arms-saudi/pompeo-says-precision-guided-missiles-as-in-yemen-cut-risks-to-civilians-idUSKCN11O2LD>.

<sup>23</sup> John S. McCain National Defense Authorization Act for Fiscal Year 2019, Pub. L. No. 115-232 (2018).



resolution into the NDAA, which passed with little modification as Section 1290 of the act.<sup>24</sup> Senator Todd Young commented: “The legislation—which would represent one of the more substantive actions by Congress in years related to Yemen—seeks to end the civil war in Yemen, protect civilians, and address the world’s largest humanitarian disaster where approximately eight million people are at risk of famine.”<sup>25</sup>

Section 1290 prohibits appropriations for in-flight refueling of coalition aircrafts if the secretary of state cannot certify that the governments of Saudi Arabia and the United Arab Emirates are undertaking:

- (A) an urgent and good faith effort to support diplomatic efforts to end the civil war in Yemen;
- (B) appropriate measures to alleviate the humanitarian crisis in Yemen by increasing access for Yemenis to food, fuel, medicine, and medical evacuation, including through the appropriate use of Yemen’s Red Sea ports, including the port of Hudaydah, the airport in Sana’a, and external border crossings with Saudi Arabia; and
- (C) demonstrable actions to reduce the risk of harm to civilians and civilian infrastructure resulting from military operations of the Government of Saudi Arabia and the Government of the United Arab Emirates in Yemen, including by —
  - (i) complying with applicable agreements and laws regulating defense articles purchased or transferred from the United States; and
  - (ii) taking appropriate steps to avoid disproportionate harm to civilians and civilian infrastructure . . . .<sup>26</sup>

The provision allows the secretary of state to waive these restrictions if he or she specifies that doing so is in the national security interest of the United States, explains why the certification cannot be made, and describes the actions the administration is taking to bring the governments of Saudi Arabia and the United Arab Emirates into compliance.<sup>27</sup> The provision also includes a detailed reporting obligation that requires the administration to provide Congress with briefings about the situation in Yemen and a strategy to accomplish the objectives of the provision.<sup>28</sup>

In Trump’s signing statement for the NDAA, he observed that Section 1290 “purport[s]” to require the president to notify Congress before taking certain military or diplomatic

<sup>24</sup> BLANCHARD & SHARP, *supra* note 1, at 5; *see also* Letter from Senators Todd Young, Jeanne Shaheen, Susan M. Collins, Christopher S. Murphy, Benjamin L. Cardin, Jack Reed, Christopher A. Coons, Tim Kaine & Cory A. Booker to Mike Pompeo, Secretary of State, U.S. Dep’t of State & James Mattis, Secretary of Defense, U.S. Dep’t of Defense (Aug. 29, 2018), *available at* [https://www.young.senate.gov/imo/media/doc/2018.08.29%20Letter%20to%20SecState%20Pompeo\\_YoungShaheen\\_Yemen%20Statute.pdf](https://www.young.senate.gov/imo/media/doc/2018.08.29%20Letter%20to%20SecState%20Pompeo_YoungShaheen_Yemen%20Statute.pdf) [<https://perma.cc/3TMP-V82F>] (stating that this provision “enjoys . . . broad, bipartisan, and bicameral support”).

<sup>25</sup> U.S. Senate, Senator Todd Young Press Release, Young, Shaheen Successfully Include Yemen Provision in NDAA Conference Report (July 24, 2018), *at* <https://www.young.senate.gov/newsroom/press-releases/young-shaheen-successfully-include-yemen-provision-in-ndaa-conference-report> [<https://perma.cc/PQF7-PC3L>].

<sup>26</sup> Pub. L. No. 115-232 § 1290(c)(1) (2018). The potential restrictions, however, do not apply to appropriations for in-flight refueling of coalition aircrafts used in certain operations, including counterterrorism missions against AQAP and ISIL and actions to prevent “the transport, assembly, or employment of ballistic missiles or components in Yemen.” § 1290(a)(1)(A)–(B).

<sup>27</sup> § 1290(a)(2).

<sup>28</sup> § 1290(b).

actions.<sup>29</sup> He deemed this provision to “encompass only actions for which such advance certification or notification is feasible and consistent with the President’s exclusive constitutional authorities as Commander in Chief and as the sole representative of the Nation in foreign affairs.”<sup>30</sup>

Two other provisions of the NDAA signal concern over civilian casualties in conjunction with U.S. military operations in general.<sup>31</sup> Section 936 calls for the designation of a senior civilian official in the Department of Defense “to develop, coordinate, and oversee compliance with the policy of the Department relating to civilian casualties resulting from United States military operations.”<sup>32</sup> The statutory provision sets out specific responsibilities for this official, including the development of “uniform processes and standards across combatant commands for accurately recording kinetic strikes by the United States military” and “the development and dissemination of best practices for reducing the likelihood of civilian casualties from United States military operations.”<sup>33</sup> The other provision—Section 1062—modifies and expands the civilian casualty reporting requirement included in the National Defense Authorization Act For Fiscal Year 2018.<sup>34</sup> Among other things, it makes clear that Congress wants reporting on “each specific mission, strike, engagement, raid, or incident” that is suspected to have caused civilian casualties and that this reporting should include “a differentiation between those killed and those injured.”<sup>35</sup> While Trump raised issues about both provisions in his signing statement,<sup>36</sup> the Department of Defense later designated an official pursuant to Section 936.<sup>37</sup>

In September 2018, Secretary of State Mike Pompeo provided an initial certification under Section 1290,<sup>38</sup> thereby enabling continued U.S. in-flight refueling of coalition aircrafts. He announced: “[T]he governments of Saudi Arabia and United Arab Emirates are undertaking

<sup>29</sup> Donald J. Trump, Statement on Signing the John S. McCain National Defense Authorization Act for Fiscal Year 2019, 2018 DAILY COMP. PRES. DOC. No. 533 at 1 (Aug. 13) [hereinafter Trump Signing Statement].

<sup>30</sup> *Id.*; see also Scott R. Anderson, *What to Make of Trump’s NDAA Signing Statement*, LAWFARE (Aug. 23, 2018), at <https://www.lawfareblog.com/what-make-trumps-ndaa-signing-statement> (considering that this standard of “feasible and consistent” . . . actually implies that the Trump administration accepts the validity of the [relevant] NDAA provisions . . . in at least some scenarios”).

<sup>31</sup> For a longer discussion of these provisions, see Rita Siemion, *Two Important New Civilian Casualties Provisions in the Defense Authorization Bill*, JUST SECURITY (July 24, 2018), at <https://www.justsecurity.org/59695/important-civilian-casualties-provisions-congressional-bill-national-defense-authorization-act>.

<sup>32</sup> Pub. L. No. 115-232 § 936(a).

<sup>33</sup> § 936(b) (also imposing a reporting obligation on this official).

<sup>34</sup> § 1062(a).

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

<sup>36</sup> Trump Signing Statement, *supra* note 29, at 1 (stating with respect to Section 936 that “my Administration will implement [this provision] consistent with the President’s authority as Commander in Chief”); *id.* at 2 (stating with respect to Section 1062 that the information sought might be subject to “executive privilege” and further that the administration considers this provision “as not requiring changes in underlying DOD processes for battle damage assessment and investigation”).

<sup>37</sup> Department of Defense, Memorandum of the Under Secretary of Defense for Policy Designating a Senior Civilian Official for Civilian Casualty Policy (Oct. 23, 2018), available at [https://www.humanrightsfirst.org/sites/default/files/CIVCAS\\_Coord%20\\_Memo\\_Final.pdf](https://www.humanrightsfirst.org/sites/default/files/CIVCAS_Coord%20_Memo_Final.pdf) (designating the deputy under secretary of defense for policy as this official).

<sup>38</sup> See generally Certification Under Section 1290 of the John S. McCain Nation Defense Authorization Act for Fiscal Year 2019 Related to Military Assistance for Saudi Arabia and the United Arab Emirates by Secretary of State Mike Pompeo, available at <https://www.young.senate.gov/imo/media/doc/Yemen%20Certification%20Unclassified.pdf> [<https://perma.cc/VS8P-83A6>].

demonstrable actions to reduce the risk of harm to civilians and civilian infrastructure resulting from military operations of these governments.”<sup>39</sup> Reporting suggests that Pompeo rejected concerns from State Department specialists worried about the rising death toll in the region and instead aligned himself with his legislative affairs team, which expressed concern that non-certification could undermine arm sales.<sup>40</sup>

Pompeo’s certification came amid heightened concern about civilian casualties caused by the Saudi-led coalition. On August 9, the coalition bombed a bus carrying about sixty students, ages eight to fourteen, to a mosque for an end of summer celebration, killing more than forty of these children.<sup>41</sup> Saudi Arabia initially characterized the action as a “legitimate military action”<sup>42</sup> but later issued a rare apology, concluding “that there were mistakes made in abiding by the rules of engagement.”<sup>43</sup> Later in August, the UN Office of the High Commissioner for Human Rights issued a report based on an earlier and extensive fact-finding mission which sharply criticized the coalition. It identified 6,475 civilian deaths from attacks in Yemen between March 2015 and June 2018, with most of these attacks carried out by coalition air strikes.<sup>44</sup> Among the conclusions of the independent experts who generated the report were that individuals in the coalition “may have conducted attacks in violation of the principles of distinction, proportionality and precaution that may amount to war crimes.”<sup>45</sup> The report also noted that since “April 2017, a cholera epidemic has swept through Yemen at an unprecedented scale” and that, as of May 2018, 8.4 million people “were on the brink of famine.”<sup>46</sup>

<sup>39</sup> U.S. Dep’t of State Press Release, Certification to Congress on Actions of Saudi Arabia and UAE in Yemen Under the NDAA (Sept. 12, 2018), at <https://www.state.gov/secretary/remarks/2018/09/285861.htm> [<https://perma.cc/X3Y7-U77Z>]. Defense Secretary Mattis endorsed Pompeo’s certification stating, “[T]he governments of Saudi Arabia and United Arab Emirates are making every effort to reduce the risk of civilian casualties and collateral damage to civilian infrastructure resulting from their military operations to end the civil war in Yemen.” U.S. Dep’t of Defense Press Release, Statement by Secretary of Defense James N. Mattis on Actions of Saudi Arabia and UAE in Yemen (Sept. 12, 2018), at <https://dod.defense.gov/News/News-Releases/News-Release-View/Article/1628689/statement-by-secretary-of-defense-james-n-mattis-on-actions-of-saudi-arabia-and> [<https://perma.cc/C3GT-A23Z>].

<sup>40</sup> Dion Nissenbaum, *Top U.S. Diplomat Backed Continuing Support for Saudi War in Yemen Over Objections of Staff*, WALL ST. J. (Sept. 20, 2018), at <https://www.wsj.com/articles/top-u-s-diplomat-backed-continuing-support-for-saudi-war-in-yemen-over-objections-of-staff-1537441200>.

<sup>41</sup> Ali Al-Mujahed & Sudarsan Raghavan, *Airstrike by U.S.-Backed Saudi coalition on Bus Kills Dozens of Yemeni Children*, WASH. POST (Aug. 9, 2018), at [https://www.washingtonpost.com/world/middle\\_east/airstrike-by-us-ally-on-bus-carrying-yemeni-children-kills-and-wounds-scores/2018/08/09/c047e55e-bbc6-42ff-a5db-4bd2e629f0b6\\_story.html?utm\\_term=.182f4c078f35](https://www.washingtonpost.com/world/middle_east/airstrike-by-us-ally-on-bus-carrying-yemeni-children-kills-and-wounds-scores/2018/08/09/c047e55e-bbc6-42ff-a5db-4bd2e629f0b6_story.html?utm_term=.182f4c078f35).

<sup>42</sup> *Id.*

<sup>43</sup> The Embassy of the Kingdom of Saudi Arabia Press Release, Statement from the Coalition to Restore Legitimacy in Yemen on August 9th JIAT Investigation Findings (Sept. 4, 2018) at <https://www.saudiembassy.net/news/statement-coalition-restore-legitimacy-yemen-august-9th-jiat-investigation-findings> [<https://perma.cc/2DWJ-PGHH>].

<sup>44</sup> Situation of Human Rights in Yemen, *supra* note 2, at 5 (noting that “the real figure is likely to be significantly higher”); see also Yemen: United Nations Experts Point to Possible War Crimes by Parties to the Conflict (Aug. 28, 2018), at <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23479> [<https://perma.cc/UWC4-8BJB>].

<sup>45</sup> Situation of Human Rights in Yemen, *supra* note 2, at 14 (also finding that that coalition members “have committed acts that may amount to war crimes, including cruel treatment and torture, outrages upon personal dignity, rape and conscripting or enlisting children under the age of 15 or using them to participate actively in hostilities”).

<sup>46</sup> *Id.* at 30–31. This number increased dramatically in subsequent months. See Humanitarian Aid, *Half the Population of Yemen at Risk of Famine: UN Emergency Relief Chief*, UN NEWS (Oct. 23, 2018), at <https://news.un>.

Within a month of Pompeo's decision to issue the Section 1290 certification, a bipartisan group of senators wrote a letter stating that "we find it difficult to reconcile known facts" with Pompeo's decision.<sup>47</sup> The letter continued:

[Y]ou certified that the Governments of Saudi Arabia and the United Arab Emirates (UAE) are undertaking "demonstrable actions to reduce the risk of harm to civilians and civilian infrastructure resulting from military operations" in Yemen.

Several facts on the ground in Yemen, however, cast serious doubt on this certification. There has been a dramatic increase in civilian casualties and deaths from Saudi-led coalition airstrikes over the last few months. The death of dozens of children in successive Saudi airstrikes in August tragically and definitively underscored this trend and the failure of the Saudi-led coalition to undertake demonstrable actions to reduce the risk of harm to civilians.

...

In short, we are skeptical a certification that the two Governments have undertaken demonstrable actions to reduce the harm to civilians is warranted when the Saudi coalition has failed to adopt some U.S. recommendations while civilian deaths and casualties due to coalition airstrikes have increased dramatically in recent months.<sup>48</sup>

In addition to concern about the Section 1290 certification, individual members of Congress have expressed more general alarm over U.S. support for the Saudi-led coalition. Senator Murphy accused the Trump administration of "turning a blind eye to likely war crimes."<sup>49</sup> In a letter to the Department of Defense's inspector general, Representative Ted Lieu stated: "I am deeply concerned that continued U.S. refueling, operational support functions and weapons transfers could qualify as aiding and abetting these potential war crimes."<sup>50</sup> Members of Congress have also introduced legislation to end U.S. support for the coalition.<sup>51</sup>

org/en/story/2018/10/1023962 [https://perma.cc/LMN8-FK8M] (estimating that as of October 2018, 14 million people were at risk of famine).

<sup>47</sup> Letter from Senators Todd Young, Jeanne Shaheen, Susan M. Collins, Christopher A. Coons, Jerry Moran, Christopher S. Murphy & Jeffrey A. Merkley to Mike Pompeo, Secretary of State, U.S. Dep't of State (Oct. 10, 2018), available at [https://www.young.senate.gov/imo/media/doc/2018.10.10%20Letter%20to%20Secretary%20Pompeo%20\(Yemen%20Certification\).pdf](https://www.young.senate.gov/imo/media/doc/2018.10.10%20Letter%20to%20Secretary%20Pompeo%20(Yemen%20Certification).pdf) [https://perma.cc/EL9W-PHPE].

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

<sup>49</sup> U.S. Senate, Senator Chris Murphy Press Release, Murphy Statement on Administration Claim That Saudi-Led War in Yemen Complies With The Law (Sept. 12, 2018), at [https://www.murphy.senate.gov/newsroom/press-releases/\\_murphy-statement-on-administration-claim-that-saudi-led-war-in-yemen-complies-with-the-law](https://www.murphy.senate.gov/newsroom/press-releases/_murphy-statement-on-administration-claim-that-saudi-led-war-in-yemen-complies-with-the-law) [https://perma.cc/FN39-VNNJ].

<sup>50</sup> Letter from Representative Ted Lieu to Glenn A. Fine, Acting Inspector General, U.S. Dep't of Defense (Aug. 13, 2018), available at <https://lieu.house.gov/sites/lieu.house.gov/files/2018-08-13%20TWL%20Letter%20to%20DoD%20IG%20Fine%20-%20Yemen.pdf> [https://perma.cc/F4T7-CK2X].

<sup>51</sup> *E.g.*, H.R. Con. Res. 138, 115th Cong. (2018); S. Res. 54, 115th Cong. (2018); see also U.S. Senate, Senator Bernie Sanders Press Release, Sanders to Bring Back War Powers Resolution to End Unauthorized U.S. Military Involvement in Yemen (Oct. 15, 2018), at <https://www.sanders.senate.gov/newsroom/press-releases/sanders-to-bring-back-war-powers-resolution-to-end-unauthorized-us-military-involvement-in-yemen> [https://perma.cc/9ULJ-22GA].

U.S.-Saudi relations have become further complicated by the brutal death of Jamal Khashoggi. Once a top journalist in Saudi Arabia, he had moved to Washington D.C. in 2017,<sup>52</sup> where he published columns in the *Washington Post* criticizing Saudi policy and Mohammed bin Salman, the Saudi crown prince.<sup>53</sup> On the afternoon of October 2, 2018, Khashoggi entered the Saudi consulate in Istanbul to obtain paperwork that he needed to marry his fiancée.<sup>54</sup> Instead, he was met by a team of operatives that had flown in from Saudi Arabia that morning to wait for him at the embassy. He was killed. According to reporting sourced to a Turkish official, Khashoggi “was dead within minutes, beheaded, dismembered, his fingers severed, and within two hours the killers were gone.”<sup>55</sup> Around the time of his death, a Saudi forensic expert flew in from Riyadh, arrived at the consulate, remained there for hours, and then returned again to Riyadh that evening.<sup>56</sup> The forensic expert was apparently brought in to dismember Khashoggi’s body for concealment.<sup>57</sup>

Faced with international outrage over the weeks that followed, Saudi Arabia cycled through conflicting narratives, including that Khashoggi had left the embassy without harm; that he had accidentally died in a fistfight in the embassy; that he was strangled by a team that had been sent to kidnap rather than kill him; and that he was killed by a lethal tranquilizer on the order of one intelligence agent at the embassy.<sup>58</sup> Although an affiliate of Mohammed bin Salman was present at Khashoggi’s killing, the Saudi government has claimed that the crown prince did not authorize the murder or know about it in advance.<sup>59</sup>

On October 23, Pompeo announced that “[w]e have identified at least some of the individuals responsible, including those in the intelligence services, the Royal Court, the foreign ministry, and other Saudi ministries who we suspect to have been involved in Mr. Khashoggi’s death” and that “[w]e are taking appropriate actions, which include revoking

<sup>52</sup> Carlotta Gall, *What Happened to Jamal Khashoggi? Conflicting Reports Deepen a Mystery*, N.Y. TIMES (Oct. 3, 2018), at <https://www.nytimes.com/2018/10/03/world/middleeast/khashoggi-saudi-journalist-istanbul.html>.

<sup>53</sup> E.g., Jamal Khashoggi, *Saudi Arabia’s Crown Prince Must Restore Dignity to His Country — by Ending Yemen’s Cruel War*, WASH. POST (Sept. 11, 2018), at [https://www.washingtonpost.com/news/global-opinions/wp/2018/09/11/saudi-arabias-crown-prince-must-restore-dignity-to-his-country-by-ending-yemens-cruel-war/?utm\\_term=.94e4d30f26a7](https://www.washingtonpost.com/news/global-opinions/wp/2018/09/11/saudi-arabias-crown-prince-must-restore-dignity-to-his-country-by-ending-yemens-cruel-war/?utm_term=.94e4d30f26a7); Jamal Khashoggi, *Saudi Arabia’s Crown Prince Already Controlled the Nation’s Media. Now He’s Squeezing It Even Further*, WASH. POST (Feb. 7, 2018), at [https://www.washingtonpost.com/news/global-opinions/wp/2018/02/07/saudi-arabias-crown-prince-already-controlled-the-nations-media-now-hes-squeezing-it-even-further/?utm\\_term=.d3b5193abef1](https://www.washingtonpost.com/news/global-opinions/wp/2018/02/07/saudi-arabias-crown-prince-already-controlled-the-nations-media-now-hes-squeezing-it-even-further/?utm_term=.d3b5193abef1).

<sup>54</sup> Gall, *supra* note 52.

<sup>55</sup> David D. Kirkpatrick & Carlotta Gall, *Audio Offers Gruesome Details of Jamal Khashoggi Killing, Turkish Official Says*, N.Y. TIMES (Oct. 17, 2018), at <https://www.nytimes.com/2018/10/17/world/europe/turkey-saudi-khashoggi-dismember.html> (further noting that Turkey apparently possessed audio tapes of what transpired within the Saudi consulate).

<sup>56</sup> Aaron C. Davis & Erin Cunningham, *Saudi Forensic Expert is Among 15 Named by Turkey in Disappearance of Journalist Jamal Khashoggi*, WASH. POST (Oct. 11, 2018), at [https://www.washingtonpost.com/world/saudi-forensic-expert-is-among-15-named-by-turkey-in-disappearance-of-journalist-jamal-khashoggi/2018/10/11/e62d6dd4-cd6a-11e8-ad0a-0e01efba3cc1\\_story.html?utm\\_term=.d66ebe4e14b2](https://www.washingtonpost.com/world/saudi-forensic-expert-is-among-15-named-by-turkey-in-disappearance-of-journalist-jamal-khashoggi/2018/10/11/e62d6dd4-cd6a-11e8-ad0a-0e01efba3cc1_story.html?utm_term=.d66ebe4e14b2) (noting that the forensic expert’s flight left Riyadh “just nine minutes after Khashoggi entered the country’s diplomatic compound in Turkey” and that he returned to Riyadh on an 11 p.m. flight).

<sup>57</sup> *See id.*

<sup>58</sup> Ben Hubbard & David D. Kirkpatrick, *Saudis Shift Account of Khashoggi Killing Again, as 5 Agents Face Death Penalty*, N.Y. TIMES (Nov. 15, 2018), at <https://www.nytimes.com/2018/11/15/world/middleeast/saudi-arabia-khashoggi-death-penalty.html>.

<sup>59</sup> *Id.* (noting that the agent, Maher Abdulaziz Mutreb, was an “intelligence agent who has often traveled abroad as part of the crown prince’s security detail”).



visas, entering visa lookouts, and other measures.”<sup>60</sup> He added that “[w]e continue to maintain a strong partnership with the Kingdom of Saudi Arabia.”<sup>61</sup> On November 15, the State Department further announced sanctions pursuant to the Global Magnitsky Human Rights Accountability Act on seventeen Saudi government officials that it deemed implicated in Khashoggi’s killing.<sup>62</sup> That same day, the Saudi public prosecutor announced the filing of criminal charges against eleven alleged perpetrators and expressed the intention of seeking the death penalty against five of them.<sup>63</sup>

The Saudi officials sanctioned by the State Department did not include Mohammed bin Salman, although news reporting has suggested that the Central Intelligence Agency (CIA) has concluded with “high confidence” that the crown prince ordered Khashoggi’s murder.<sup>64</sup> On November 20, Trump issued a statement indicating reluctance to hold the crown prince accountable.<sup>65</sup> The statement included the following:

The world is a very dangerous place!

. . .

. . . Saudi Arabia would gladly withdraw from Yemen if the Iranians would agree to leave. They would immediately provide desperately needed humanitarian assistance. . . .

After my heavily negotiated trip to Saudi Arabia last year, the Kingdom agreed to spend and invest \$450 billion in the United States. . . . Of the \$450 billion, \$110 billion will be spent on the purchase of military equipment from Boeing, Lockheed Martin, Raytheon and many other great U.S. defense contractors. If we foolishly cancel these contracts, Russia and China would be the enormous beneficiaries—and very happy to acquire all of this newfound business. . . .

The crime against Jamal Khashoggi was a terrible one, and one that our country does not condone. Indeed, we have taken strong action against those already known to have participated in the murder. . . .

. . . King Salman and Crown Prince Mohammad bin Salman vigorously deny any knowledge of the planning or execution of the murder of Mr. Khashoggi. Our intelligence agencies continue to assess all information, but it could very well be that the Crown Prince had knowledge of this tragic event—maybe he did and maybe he didn’t!

<sup>60</sup> U.S. Dep’t of State Press Release, Remarks to Press by Secretary of State Mike Pompeo (Oct. 23, 2018), at <https://www.state.gov/secretary/remarks/2018/10/286854.htm> [<https://perma.cc/CPC9-KD67>].

<sup>61</sup> *Id.*

<sup>62</sup> U.S. Dep’t of State Press Release, Global Magnitsky Sanctions on Individuals Involved in the Killing of Jamal Khashoggi (Nov. 15, 2018), at <https://www.state.gov/secretary/remarks/2018/11/287376.htm> [<https://perma.cc/WZW2-Y3XM>] (noting that “all of these individuals’ assets within U.S. jurisdiction are blocked, and U.S. persons are generally prohibited from engaging in transactions with them”).

<sup>63</sup> Hubbard & Kirkpatrick, *supra* note 58.

<sup>64</sup> Shane Harris, Greg Miller & Josh Dawsey, *CIA Concludes Saudi Crown Prince Ordered Jamal Khashoggi’s Assassination*, WASH. POST (Nov. 16, 2018), at [https://www.washingtonpost.com/world/national-security/cia-concludes-saudi-crown-prince-ordered-jamal-khashoggis-assassination/2018/11/16/98c89fe6-e9b2-11e8-a939-9469f1166f9d\\_story.html?utm\\_term=.4a3a922edb5e](https://www.washingtonpost.com/world/national-security/cia-concludes-saudi-crown-prince-ordered-jamal-khashoggis-assassination/2018/11/16/98c89fe6-e9b2-11e8-a939-9469f1166f9d_story.html?utm_term=.4a3a922edb5e).

<sup>65</sup> White House Press Release, Statement from President Donald J. Trump on Standing with Saudi Arabia (Nov. 20, 2018), at <https://www.whitehouse.gov/briefings-statements/statement-president-donald-j-trump-standing-saudi-arabia>.



That being said, we may *never* know all of the facts surrounding the murder of Mr. Jamal Khashoggi. In any case, our relationship is with the Kingdom of Saudi Arabia. They have been a great ally in our very important fight against Iran. The United States intends to remain a steadfast partner of Saudi Arabia to ensure the interests of our country, Israel, and all our other partners in the region.<sup>66</sup>

Trump's statement triggered outrage from members of Congress of both parties. Senator Chuck Schumer tweeted that this is "not how a U.S. President responds to the murder of a journalist and American resident."<sup>67</sup> As another even more pointed example, Senator Bob Corker tweeted that "I never thought I'd see the day a White House would moonlight as a public relations firm for the Crown Prince of Saudi Arabia."<sup>68</sup>

Khashoggi's death has also drawn additional attention to U.S. involvement in the Saudi coalition's campaign in Yemen. Not long after the killing, Senator Paul promised to force a floor vote over future arms sales to Saudi Arabia,<sup>69</sup> and several other senators introduced a bill that would impose sanctions and other measures on those responsible for the crisis in Yemen and for the death of Khashoggi.<sup>70</sup> In a notable signal, the Senate also voted 63–37 to advance a resolution aimed at ending U.S. military support for the Saudi-led coalition.<sup>71</sup> "The Senate then approved this resolution, 56–41, and also unanimously approved a resolution expressing its view that Mohammed bin Salman was involved in Khashoggi's death."<sup>72</sup> In the executive branch as well, several policy developments occurred in the months that followed Khashoggi's death. Pressure mounted to stop refueling of the Saudi-led coalition, leading Saudi Arabia to preemptively announce that it would no longer seek U.S. assistance with refueling.<sup>73</sup> In another development, Pompeo urged a ceasefire, saying that "[t]he United

<sup>66</sup> *Id.*

<sup>67</sup> Chuck Schumer (@SenSchumer), TWITTER (Nov. 20, 2018, 12:22pm), at <https://twitter.com/senschumer/status/1064977318865788928?lang=en>.

<sup>68</sup> Bob Corker (@SenBobCorker), TWITTER (Nov. 20, 2018, 2:18pm), at <https://twitter.com/senbobcorker/status/1065006401272143873?lang=en>. For some other responses, see Adam Edelman & F. Brinley Bruton, *In Unusual Statement Disputing the CIA and Filled with Exclamation Points, Trump Backs Saudi Ruler After Khashoggi Killing*, NBC NEWS (Nov. 20, 2018), at <https://www.nbcnews.com/politics/donald-trump/unusual-statement-disputing-cia-filled-exclamation-points-trump-backs-saudi-n938526>.

<sup>69</sup> Jordain Carney, *Rand Paul Vows to Force Vote on Saudi Arms Sales Over Missing Journalist*, THE HILL (Oct. 9, 2018), at <https://thehill.com/homenews/senate/410585-rand-paul-vows-to-force-vote-on-saudi-arms-sales-over-missing-journalist>.

<sup>70</sup> U.S. Senate, Senator Bob Menendez Press Release, Menendez, Young, Reed, Graham, Shaheen, Collins Introduce Comprehensive Saudi Arabia Accountability and Yemen Act (Nov. 15, 2018), at <https://www.menendez.senate.gov/news-and-events/press/menendez-young-reed-graham-shaheen-collins-introduce-comprehensive-saudi-arabia-accountability-and-yemen-act> [https://perma.cc/R382-HWD8].

<sup>71</sup> Karoun Demirjian, Carol Morello & John Hudson, *Rebuking Trump, Senators Back Effort to Suspend U.S. Support for the Saudi-led War in Yemen*, WASH. POST (Nov. 28, 2018), at [https://www.washingtonpost.com/powerpost/pompeo-mattis-to-brief-senate-on-saudi-arabia-khashoggi-and-yemen/2018/11/27/ee4e36c0-f28a-11e8-bc79-68604ed88993\\_story.html?utm\\_term=.5a90efbfd910](https://www.washingtonpost.com/powerpost/pompeo-mattis-to-brief-senate-on-saudi-arabia-khashoggi-and-yemen/2018/11/27/ee4e36c0-f28a-11e8-bc79-68604ed88993_story.html?utm_term=.5a90efbfd910). This resolution was brought forward through a procedural mechanism set out under the War Powers Resolution. *See id.*

<sup>72</sup> "Julie Hirschfeld Davis & Eric Schmitt, *Senate Votes to End Aid for Yemen Fight Over Khashoggi Killing and Saudis' War Aims*, N.Y. TIMES (Dec. 13, 2018), at <https://www.nytimes.com/2018/12/13/us/politics/yemen-saudi-war-pompeo-mattis.html>. In the absence of similar action by the House of Representatives, the effect of these resolutions is symbolic. *See id.*"

<sup>73</sup> Wesley Morgan, *Pentagon: No More Refueling of Saudi Aircraft Bombing Yemen*, POLITICO (Nov. 9, 2018).

States calls on all parties to support UN Special Envoy Martin Griffiths in finding a peaceful solution to the conflict in Yemen . . . . The time is now for the cessation of hostilities.”<sup>74</sup>

#### INTERNATIONAL CRIMINAL LAW

*Trump Administration Expresses Strong Disapproval of the International Criminal Court*

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On September 10, 2018, U.S. National Security Advisor John Bolton delivered an address fiercely criticizing the International Criminal Court (ICC).<sup>1</sup> Bolton challenged the legitimacy of the ICC and expressed particular concern over its inquiry into potential war crimes committed by members of the U.S. military and intelligence agencies in Afghanistan. He identified retaliatory measures the United States would undertake if the ICC “comes after us, Israel or other U.S. allies.”<sup>2</sup>

In his address, Bolton harkened back to certain actions taken by the United States during the George W. Bush administration in opposition to the ICC, including actions in which Bolton himself was involved as a member of that administration. He mentioned President Bush’s decision to “unsign” the Rome Statute; Congress’s passage of “The American Servicemembers’ Protection Act, or ASPA, which some have branded “The Hague Invasion Act”; and the Bush administration’s negotiation of “about 100 binding, bilateral agreements to prevent other countries from delivering U.S. personnel to the ICC.”<sup>3</sup> Bolton made no mention of the approach taken by the Obama administration to the ICC, which had been to “end hostility towards the ICC, and look for opportunities to encourage effective ICC action in ways that promote U.S. interests by bringing war criminals to justice.”<sup>4</sup>

Bolton stated that the “worst predictions” from the George W. Bush era “were confirmed” by the ICC prosecutor’s request in November 2017 to initiate an investigation into war crimes and crimes against humanity committed in Afghanistan and neighboring countries.<sup>5</sup>

<sup>74</sup> U.S. Dep’t of State Press Release, Ending the Conflict in Yemen (Oct. 30, 2018), at <https://www.state.gov/secretary/remarks/2018/10/287018.htm> [<https://perma.cc/CSA4-GBW6>].

<sup>1</sup> John Bolton, Assistant to the President for National Security Affairs, National Security Advisor, Protecting American Constitutionalism and Sovereignty from International Threats (Sept. 10, 2018), available at <https://www.justsecurity.org/60674/national-security-adviser-john-bolton-remarks-international-criminal-court>; see also White House Fact Sheet, Protecting American Constitutionalism and Sovereignty from the International Criminal Court (Sept. 10, 2018), at <https://www.whitehouse.gov/briefings-statements/protecting-american-constitutionalism-sovereignty-international-criminal-court> [<https://perma.cc/7TBT-JK8A>].

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

<sup>3</sup> *Id.* Among other provisions, ASPA authorizes the president to use all “means necessary and appropriate” to free U.S. military personnel or other U.S. government employees detained or imprisoned “by, on behalf of, or at the request of the International Criminal Court.” Pub. L. 107-206, 116 Stat. 820, 905 (2002) (codified at 22 U.S.C. § 7427 (2012)).

<sup>4</sup> Harold Hongju Koh, *International Criminal Justice 5.0*, 38 YALE J. INT’L L. 525, 534 (2013) (quoting Secretary of State Hillary Clinton and going on to describe the Obama administration’s approach to the ICC).

<sup>5</sup> Bolton, *supra* note 1; see also International Criminal Court Statement, The Prosecutor of the International Criminal Court, Fatou Bensouda, Requests Judicial Authorisation to Commence an Investigation into the

For more than a decade before this request, the prosecutor had conducted a preliminary examination into the situation of Afghanistan.<sup>6</sup> In seeking permission from the ICC bench to move forward and open an investigation, the prosecutor specifically identified war crimes committed by U.S. military and intelligence personnel as one set of crimes that she “has determined that there is a reasonable basis to believe . . . have occurred.”<sup>7</sup>

Bolton expressed outrage at what he termed “an utterly unfounded, unjustifiable investigation.”<sup>8</sup> He stated:

Today, on the eve of September 11th, I want to deliver a clear and unambiguous message on behalf of the President of the United States. The United States will use any means necessary to protect our citizens and those of our allies from unjust prosecution by this illegitimate court.

We will not cooperate with the ICC. We will provide no assistance to the ICC. We will not join the ICC.

We will let the ICC die on its own. After all, for all intents and purposes, the ICC is already dead to us.

The United States bases this policy on five principal concerns about the Court, its purported authority, and its effectiveness.

First, the International Criminal Court unacceptably threatens American sovereignty and U.S. national security interests. The Prosecutor in The Hague claims essentially unfettered discretion to investigate, charge, and prosecute individuals, regardless of whether their countries have acceded to the Rome Statute.

...

Second, the International Criminal Court claims jurisdiction over crimes that have disputed and ambiguous definitions, exacerbating the Court’s unfettered powers.

...

Third, the International Criminal Court fails in its fundamental objective to deter and punish atrocity crimes. Since its 2002 inception, the Court has spent over \$1.5 billion dollars, while attaining only eight convictions.

...

Situation in the Islamic Republic of Afghanistan (Nov. 20, 2017), at <https://www.icc-cpi.int/Pages/item.aspx?name=171120-otp-stat-afgh> [<https://perma.cc/C2V3-XDC3>] [hereinafter Description of Prosecutor’s Request].

<sup>6</sup> Description of Prosecutor’s Request, *supra* note 5. The Rome Statute gives the ICC jurisdiction over crimes committed on the territory of a state party, which Afghanistan has been since 2003, “regardless of whether the alleged suspects are nationals of a State Party.” Situation in the Islamic Republic of Afghanistan, ICC-02/17, Public Redacted Version of Request for Authorisation of an Investigation Pursuant to Article 15, para. 44 (Nov. 20, 2017), available at [https://www.icc-cpi.int/CourtRecords/CR2017\\_06891.PDF](https://www.icc-cpi.int/CourtRecords/CR2017_06891.PDF).

<sup>7</sup> Description of Prosecutor’s Request, *supra* note 5 (referencing “[w]ar crimes by members of the United States . . . armed forces on the territory of Afghanistan, and by members of the U.S. Central Intelligence Agency . . . in secret detention facilities in Afghanistan and on the territory of other State Parties to the Rome Statute, principally in the period of 2003–2004”).

<sup>8</sup> Bolton, *supra* note 1.

Fourth, the International Criminal Court is superfluous, given that domestic U.S. judicial systems already hold American citizens to the highest legal and ethical standards. U.S. service members in the field must operate fully in accordance with the law of armed conflict. When violations of law do occur, the United States takes appropriate and swift action to hold perpetrators accountable.

...

Fifth, the International Criminal Court's authority has been sharply criticized and rejected by most of the world. Today, more than 70 nations, representing two-thirds of the world's population, and over 70% of the world's armed forces, are not members of the ICC.<sup>9</sup>

At the close of his remarks, Bolton identified potential responses by the United States to the ICC:

If the Court comes after us, Israel or other U.S. allies, we will not sit quietly. We will take the following steps, among others, in accordance with the American Servicemembers' Protection Act and our other legal authorities:

- We will negotiate even more binding, bilateral agreements to prohibit nations from surrendering U.S. persons to the ICC. And we will ensure that those we have already entered are honored by our counterpart governments.
- We will respond against the ICC and its personnel to the extent permitted by U.S. law. We will ban its judges and prosecutors from entering the United States. We will sanction their funds in the U.S. financial system, and, we will prosecute them in the U.S. criminal system. We will do the same for any company or state that assists an ICC investigation of Americans.
- We will take note if any countries cooperate with ICC investigations of the United States and its allies, and we will remember that cooperation when setting U.S. foreign assistance, military assistance, and intelligence sharing levels.
- We will consider taking steps in the UN Security Council to constrain the Court's sweeping powers, including ensuring that the ICC does not exercise jurisdiction over Americans and the nationals of our allies that have not ratified the Rome Statute.<sup>10</sup>

In response to Bolton's statements, the ICC issued a brief press release:

The International Criminal Court . . . is aware of the speech delivered on 10 September 2018 by US National Security Advisor, John Bolton, concerning the ICC.

The Court was established and constituted under the Rome Statute, the Court's founding treaty—to which 123 countries from all regions of the world are party and have pledged their support through ratification—as an instrument to ensure accountability for crimes that shock the conscience of humanity. The Court is an independent and impartial judicial institution.

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

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

The Court's jurisdiction is subject to the primary jurisdiction of States themselves to investigate and prosecute allegations of those crimes and bring justice to the affected communities. It is only when the States concerned fail to do so at all or genuinely that the ICC will exercise jurisdiction.

The ICC, as a court of law, will continue to do its work undeterred, in accordance with those principles and the overarching idea of the rule of law.<sup>11</sup>

In the aftermath of Bolton's speech, the ICC received statements of support from leaders in the European Union and some states, while Bolton's remarks drew the approval of officials in a few countries, such as Sudan.<sup>12</sup> Bolton's speech also drew a flurry of critical responses from legal scholars and practitioners within the United States. David Scheffer, the U.S. ambassador for war crimes issues during the second term of President Bill Clinton, described the speech as "isolat[ing] the United States from international criminal justice and severely undermin[ing] our leadership in bringing perpetrators of atrocity crimes to justice elsewhere in the world."<sup>13</sup> John Bellinger, who was legal adviser to the State Department during the second term of George W. Bush, deemed it "unfortunate . . . that the Trump administration did not engage in quiet diplomacy with the Court to try to work out a resolution [with respect to Afghanistan] instead of throwing down the gauntlet in public."<sup>14</sup>

Commentators also indicated considerable skepticism about whether the Trump administration had the legal authority or political capital to undertake some of the retaliatory measures suggested by Bolton. Bellinger observed that he "is not aware of any federal criminal statute that could be used to charge ICC judges or prosecutors, much less companies or foreign governments that cooperate with the court" and also expressed doubts about the Trump

<sup>11</sup> Statement, International Criminal Court, *The ICC Will Continue Its Independent and Impartial Work, Undeterred*, ICC-CPI-20180912-PR1406 (Sept. 12, 2018), at <https://www.icc-cpi.int/Pages/item.aspx?name=pr1406> [<https://perma.cc/ZMR9-GBBA>].

<sup>12</sup> Alex Moorehead & Alex Whiting, *Countries' Reactions to Bolton's Attack on the ICC*, JUST SECURITY (Sept. 18, 2018), at <https://www.justsecurity.org/60773/countries-reactions-boltons-attack-icc> (compiling responses by state officials and noting, with respect to Sudan, that the ICC has long been investigating crimes committed on its territory); see also International Residual Mechanism for Criminal Tribunals Press Release, *Statement of President Meron in Support of the ICC* (Sept. 13, 2018) (noting that "[a]t a time when the Court and the Rome system itself continue to face challenges . . . I wish to pause and salute the Judges and the leadership of the ICC . . . [who] are helping to bring us ever closer to our fundamental aim: ending impunity for serious violations of international law").

<sup>13</sup> David Scheffer, *Ambass. David Scheffer on John Bolton's Announcement of "Ugly and Dangerous" Punitive Actions Against Judges, Prosecutors of Int'l Criminal Court*, JUST SECURITY (Sept. 10, 2018), at <https://www.justsecurity.org/60678/ambass-david-scheffer-john-boltons-announcement-ugly-dangerous-punitive-actions-judges-prosecutors-intl-criminal-court>; see also, e.g., Jane Stromseth, *Why Bolton's Assault on the ICC Is Not in U.S. Interests*, JUST SECURITY (Sept. 14, 2018), at <https://www.justsecurity.org/60743/boltons-assault-icc-u-s-interests> (contending that these policies "undermine[] crucial efforts to strengthen legal accountability in domestic courts in many countries emerging from conflict"); Jennifer Trahan, *The Fallacy That Attacking a Judicial Institution and Its Personnel Protects Americans: A Response to John Bolton's Speech*, OPINIO JURIS (Sept. 12, 2018), at <http://opiniojuris.org/2018/09/12/the-fallacy-that-attacking-a-judicial-institution-and-its-personnel-protects-americans-a-response-to-john-boltons-speech> (observing that "[t]hese bullying tactics do not well-serve the [United States], and will be seen for what they are").

<sup>14</sup> John Bellinger, *The Trump Administration Throws Down the Gauntlet to the ICC. The Court Should Decline the Challenge*, LAWFARE (Sept. 10, 2018), at <https://www.lawfareblog.com/trump-administration-throws-down-gauntlet-icc-court-should-decline-challenge> (also deeming the ICC Prosecutor "unwise" in seeking to open an investigation into war crimes committed by U.S. officials).

administration's ability to impose sanctions on ICC judges and prosecutors.<sup>15</sup> As to Bolton's call for more bilateral agreements prohibiting countries from sending Americans to the ICC and potentially for a Security Council resolution limiting the reach of the ICC, it is far from clear that these measures would receive the needed support from other countries.<sup>16</sup>

Several weeks after Bolton's speech, President Trump briefly reiterated U.S. concerns about the ICC in his address to the UN General Assembly. Trump declared that "[a]s far as America is concerned, the ICC has no jurisdiction, no legitimacy, and no authority. . . . We will never surrender America's sovereignty to an unelected, unaccountable, global bureaucracy."<sup>17</sup>

#### USE OF FORCE, ARMS CONTROL, AND NONPROLIFERATION

##### *Iran Initiates Suit Against the United States in the International Court of Justice, While Sanctions Take Effect*

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In the wake of President Trump's decision to withdraw the United States from the Joint Comprehensive Plan of Action (JCPOA) and reimpose sanctions, Iran instituted proceedings against the United States before the International Court of Justice (ICJ). In its application, filed on July 16, 2018, Iran alleged that the re-imposition of sanctions constituted a violation of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Treaty of Amity) between Iran and the United States. In order to prevent "irreparable damages" to the Iranian economy, Iran simultaneously filed a request for provisional measures.<sup>1</sup> After the ICJ issued an order unanimously granting limited provisional measures on October 3, 2018, the United States announced its intention to terminate the Treaty of Amity. The United States issued its first phase of sanctions on August 7, 2018, and the remaining sanctions took effect on November 5, 2018.

<sup>15</sup> *Id.* (noting that "[i]t would be an extraordinary stretch" to determine that, under the International Emergency Economic Powers Act, the ICC posed a "national emergency" to justify sanctioning judges and prosecutors); see also Alex Whiting, *Why John Bolton vs. Int'l Criminal Court 2.0 Is Different from Version 1.0*, JUST SECURITY (Sept. 10, 2018), at <https://www.justsecurity.org/60680/international-criminal-court-john-bolton-afghanistan-torture> (noting that "there appears to be no domestic legal authority to take up the core of these measures").

<sup>16</sup> See David Bosco, *Bolton Barked at the ICC, But With How Much Bite*, LAWFARE (Sept. 11, 2018), at <https://www.lawfareblog.com/bolton-barked-icc-how-much-bite> (observing that countries that have not already signed such immunity agreements are unlikely to do so under the Trump administration and that "it is exceedingly unlikely that Britain and France (or the requisite number of non-permanent members) will support general anti-ICC resolutions" at the Security Council).

<sup>17</sup> Donald J. Trump, Remarks to the United Nations General Assembly in New York City, 2018 DAILY COMP. PRES. DOC. 631, at 4 (Sept. 25).

<sup>1</sup> Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Iran v. U.S.), Request for the Indication of Provisional Measures, 2018 ICJ (July 16), available at <https://www.icj-cij.org/files/case-related/175/175-20180716-REQ-01-00-EN.pdf> [hereinafter 2018 Request for the Indication of Provisional Measures].



On May 8, 2018, Trump announced the withdrawal of the United States from the JCPOA.<sup>2</sup> Under the JCPOA—a multilateral commitment reached in July 2015 between Iran, the five permanent members of the Security Council, Germany, and the European Union—Iran agreed to abide by verifiable limits on its nuclear program in exchange for the lifting of nuclear-related sanctions.<sup>3</sup> In announcing the U.S. withdrawal from the JCPOA, Trump issued a presidential memorandum re-imposing “all United States sanctions lifted or waived in connection with the JCPOA” within 180 days.<sup>4</sup> These sanctions included both primary and secondary sanctions on domestic and foreign entities and were to be implemented in two phases: phase one would go into effect ninety days later on August 7 for various non-energy-related sanctions, and phase two would go into effect 180 days later on November 5 for the remaining sanctions.<sup>5</sup>

On July 16, in response to the looming sanctions, Iran initiated suit against the United States before the ICJ.<sup>6</sup> Iran sought a judgment declaring that the sanctions announced by the United States on May 8 were a breach of its international obligations under the Treaty of Amity and ordering the immediate termination of all sanctions and associated threats.<sup>7</sup> Additionally, Iran sought full compensation from the United States for violating the asserted legal obligations.<sup>8</sup>

The Treaty of Amity between Iran and the United States was signed on August 15, 1955, and entered into force on June 16, 1957.<sup>9</sup> In its application, Iran alleged that the U.S. sanctions violated Articles IV(1), VII(1), VIII(1), VIII(2), IX(2), and X(1), which provide in relevant part:

Article IV(1). Each High Contracting Party shall at all times accord fair and equitable treatment to nationals and companies of the other High Contracting Party, and to their property and enterprises; shall refrain from applying unreasonable or discriminatory measures that would impair their legally acquired rights and interests. . . .

Article VII(1). Neither High Contracting Party shall apply restrictions on the making of payments, remittances, and other transfers of funds to or from the territories of the other High Contracting Party . . . .

Article VIII(1). Each High Contracting Party shall accord to products of the other High

<sup>2</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. NO. 310 (May 8).

<sup>3</sup> Joint Comprehensive Plan of Action, July 14, 2015, 55 ILM 98, 108 (2016). The JCPOA was quickly followed by the Security Council’s passage of Resolution 2231, which “[c]all[ed] upon all Member States . . . 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.” SC Res. 2231, paras. 1–2 (July 20, 2015).

<sup>4</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>].

<sup>5</sup> See Jean Galbraith, Contemporary Practice of the United States, 112 AJIL 514, 518–19 (2018) (providing a more detailed discussion of the presidential memorandum and its implications).

<sup>6</sup> Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Iran v. U.S.), Application Instituting Proceedings, 2018 ICJ (July 16), available at <https://www.icj-cij.org/files/case-related/175/175-20180716-APP-01-00-EN.pdf> [hereinafter 2018 Application Instituting Proceedings].

<sup>7</sup> *Id.*, para. 50(a)–(c).

<sup>8</sup> *Id.*, para. 50(e).

<sup>9</sup> Treaty of Amity, Economic Relations, and Consular Rights, Iran-U.S., Aug. 15, 1955, 8 UST 899 [hereinafter Treaty of Amity]. The Senate advised and consented to the Treaty of Amity on July 11, 1956. 102 Cong. Rec. 12244 (1956).

Contracting Party . . . and to products destined for exportation to the territories of such other High Contracting Party . . . treatment no less favorable than that accorded like products of or destined for exportation to any third country . . . .

Article VIII(2). Neither High Contracting Party shall impose restrictions or prohibitions on the importation of any product of the other High Contracting Party or on the exportation of any product to the territories of the other High Contracting Party . . . .

Article IX(2). Nationals and companies of either High Contracting Party shall be accorded treatment no less favorable than that accorded nationals and companies of the other High Contracting Party, or of any third country, with respect to all matters relating to importation and exportation.

Article X(1). Between the territories of the two High Contracting Parties there shall be freedom of commerce and navigation.<sup>10</sup>

As a basis for the jurisdiction of the ICJ, Iran invoked Article XXI(2) of the Treaty of Amity, which provides:

Any dispute between the High Contracting Parties as to the interpretation or application of the present Treaty, not satisfactorily adjusted by diplomacy, shall be submitted to the International Court of Justice, unless the High Contracting Parties agree to settlement by some other pacific means.<sup>11</sup>

The United States and Iran entered into the Treaty of Amity long before the Iranian revolution of the late 1970s, which in turn sent relations between the United States and Iran into a dramatic decline. Since the Iranian revolution, the Treaty of Amity has been a basis for claims between the two nations at the ICJ on three previous occasions. On November 29, 1979, the United States initiated proceedings against Iran regarding the occupation of the American embassy in Tehran by Iranian militants, alleging among other things that Iran had failed to provide U.S. nationals with “the most constant protection and security” within its territory.<sup>12</sup> On November 2, 1992, Iran in turn invoked the Treaty of Amity against the United States in the ICJ, alleging that the destruction of Iranian oil platforms caused by the U.S. Navy violated the treaty’s provisions protecting freedom of commerce and navigation.<sup>13</sup> Most recently, on June 14, 2016, Iran instituted

<sup>10</sup> Treaty of Amity, *supra* note 9; see also 2018 Application Instituting Proceedings, *supra* note 6, paras. 39–49 (setting forth the arguments of Iran with respect to these provisions).

<sup>11</sup> Treaty of Amity, *supra* note 9, Art. XXI(2); see also 2018 Application Instituting Proceedings, *supra* note 6, paras. 5–7 (invoking this provision and detailing Iran’s efforts to raise the issue with the United States prior to bringing the case through a diplomatic note transmitted by Switzerland).

<sup>12</sup> Concerning United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), Pleadings, 1979 ICJ, at 7 (Nov. 29), available at <https://www.icj-cij.org/files/case-related/64/9545.pdf> (quoting Article II(4) of the Treaty of Amity). In its judgment of May 24, 1980, the ICJ concluded that Iran had breached its international legal obligations, including with respect to the Treaty of Amity, and was bound to release the U.S. hostages and make reparation to the United States. Concerning United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), Judgment, 1979 ICJ 3 (Nov. 29), available at <https://www.icj-cij.org/files/case-related/64/064-19800524-JUD-01-00-EN.pdf>.

<sup>13</sup> Oil Platforms (Iran v. U.S.), Application Instituting Proceedings, 1992 ICJ (Nov. 2), available at <https://www.icj-cij.org/files/case-related/90/7211.pdf>. The ICJ delivered a final judgment on November 6, 2003, in which it concluded that neither the United States nor Iran had breached its obligations under the Treaty of

still-pending proceedings against the United States before the ICJ alleging violations of the Treaty of Amity with respect to the seizure of Iranian assets in the United States to satisfy U.S. domestic court judgments.<sup>14</sup>

In challenging the U.S. sanctions as a violation of the Treaty of Amity, Iran also filed a request for provisional measures during the pendency of the case. Iran asserted “a real and imminent risk that irreparable prejudice” would follow from the implementation of U.S. sanctions prior to the ICJ’s decision.<sup>15</sup> Accordingly, Iran requested the ICJ to impose, among other measures, “the suspension of the implementation and enforcement of all of the 8 May sanctions.”<sup>16</sup>

In response to the request for provisional measures, on July 27 the United States submitted a letter to the ICJ that “strongly object[ed] to Iran’s Application on a number of grounds, and consider[ed] that the Court manifestly lack[ed] jurisdiction in respect of this case.”<sup>17</sup> The United States considered that Iran’s underlying grievance related not to the Treaty of Amity but rather to the U.S. withdrawal from the JCPOA, which does not have a compromissory clause providing the ICJ with jurisdiction.<sup>18</sup> As to the Treaty of Amity, the United States argued that the sanctions fell outside its scope because of limits set forth expressly in Article XX(1), which provides:

Article XX(1). The present Treaty shall not preclude the application of measures:

...

(b) relating to fissionable materials, the radio-active by-products thereof, or the sources thereof;

...

(d) necessary to fulfill the obligations of a High Contracting Party for the maintenance or restoration of international peace and security, or necessary to protect its essential security interests.<sup>19</sup>

Amity, thus rejecting Iran’s claim and the United States’ counterclaim for reparation. *Oil Platforms (Iran v. U.S.)*, Judgment, 1992 ICJ 161 (Nov. 2), available at <https://www.icj-cij.org/files/case-related/90/090-20031106-JUD-01-00-EN.pdf>.

<sup>14</sup> *Certain Iranian Assets (Iran v. U.S.)*, Application Instituting Proceedings, 2016 ICJ (June 14), available at <https://www.icj-cij.org/files/case-related/164/164-20160614-APP-01-00-EN.pdf> (focusing on cases brought in the United States under the exception to state immunity under the Foreign Sovereign Immunities Act for state-sponsored terrorism); see also *Certain Iranian Assets (Iran v. U.S.)*, at <https://www.icj-cij.org/en/case/164> (listing the filings and proceedings in the pending case).

<sup>15</sup> 2018 Request for the Indication of Provisional Measures, *supra* note 1, para. 25.

<sup>16</sup> *Id.*, para. 42(a).

<sup>17</sup> *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Iran v. U.S.)*, Order, 2018 ICJ, at para. 12 (Oct. 3), available at <https://www.icj-cij.org/files/case-related/175/175-20181003-ORD-01-00-EN.pdf> [hereinafter October 3 Order] (quoting the U.S. letter) (alterations in original).

<sup>18</sup> See *id.*

<sup>19</sup> *Treaty of Amity*, *supra* note 9, Art. XX(1); see also Oct. 3 Order, *supra* note 17, paras. 34, 37 (summarizing the U.S. arguments); cf. U.S. Dep’t of State Press Release, On U.S. Appearance Before the International Court of Justice (Aug. 27, 2018), at <https://www.state.gov/secretary/remarks/2018/08/285411.htm> [<https://perma.cc/3C8Z-TQAC>] (describing Iran’s arguments as “meritless” and “a misuse of the Court”).

Following oral proceedings in late August, the ICJ issued an order on October 3 that unanimously provided for limited provisional measures.<sup>20</sup> The Court concluded that it had jurisdiction over at least many of Iran's claims under the Treaty of Amity.<sup>21</sup> It also recognized that Article XX(1) might ultimately prove a bar to some of Iran's claims:

However, the Court considers that, in so far as the measures complained of by Iran could relate "to fissionable materials, the radio-active by-products thereof, or the sources thereof" or could be "necessary to protect . . . essential security interests" of the United States, the application of Article XX paragraph 1, subparagraphs (b) or (d), might affect at least some of the rights invoked by Iran under the Treaty of Amity.

Nonetheless, the Court is of the view that other rights asserted by Iran under the 1955 Treaty would not be so affected. In particular, Iran's rights relating to the importation and purchase of goods required for humanitarian needs, and to the safety of civil aviation, cannot plausibly be considered to give rise to the invocation of Article XX, paragraph 1, subparagraphs (b) or (d).<sup>22</sup>

The ICJ thus instructed the United States to remove impediments to imports related to medicine, food, and certain goods and services relevant to civil aviation, but did not issue provisional measures with respect to other sanctions.<sup>23</sup>

Hours after this ruling was released, Secretary of State Mike Pompeo announced that the United States would terminate the Treaty of Amity.<sup>24</sup> Pursuant to the terms of the treaty, termination can be done by either party after one year of written notice is given to the other party.<sup>25</sup> In his remarks, Pompeo asserted that the ICJ decision largely favored the United States and emphasized a preexisting U.S. intention to allow some humanitarian relief from sanctions:

Given Iran's history of terrorism, ballistic missile activity, and other malign behaviors, Iran's claims under the treaty are absurd. The court's ruling today was a defeat for Iran. It rightly rejected all of Iran's baseless requests. The court denied Iran's attempt to secure broad measures to interfere with U.S. sanctions and rightly noted Iran's history of noncompliance with its international obligations under the Treaty on the Nonproliferation of Nuclear Weapons.

With regard to the aspects of the court's order focusing on potential humanitarian issues, we have been clear: Existing exceptions, authorizations, and licensing policies for

<sup>20</sup> October 3 Order, *supra* note 17, para. 102. Judge Donoghue did not participate in the case. In her stead, the United States selected Charles Brower as an *ad hoc* judge. *Id.*, para. 9.

<sup>21</sup> *Id.*, paras. 41–44 (finding jurisdiction "at least" with respect to "the revocation of licenses and authorizations granted for certain commercial transactions between Iran and the United States, the ban on trade of certain items, and limitations to financial activities").

<sup>22</sup> *Id.*, paras. 68–69 (ellipsis in original).

<sup>23</sup> *Id.*, para. 102; *see also id.*, para. 91 (finding that irreparable prejudice with respect to the health and safety of Iranians would rise from the absence of the limited provisional measures granted).

<sup>24</sup> U.S. Dep't of State Press Release, Remarks to the Media (Oct. 3, 2018), at <https://www.state.gov/secretary/remarks/2018/10/286417.htm> [<https://perma.cc/29C4-5RKK>] [hereinafter Pompeo Remarks of Oct. 3]. For more discussion of the U.S. withdrawal from this treaty, see Jean Galbraith, Contemporary Practice of the United States, 113 AJIL 133 (2019).

<sup>25</sup> Treaty of Amity, *supra* note 9, Art. XXIII(2)–(3). It is unclear whether the United States has provided formal written notice to Iran in accordance with the terms of the Treaty of Amity.

humanitarian-related transactions and safety of flight will remain in effect. The United States has been actively engaged on these issues without regard to any proceeding before the ICJ. We're working closely with the Department of the Treasury to ensure that certain humanitarian-related transactions involving Iran can and will continue.

That said, we're disappointed that the court failed to recognize it has no jurisdiction to issue any order relating to these sanctions measures with the United States, which is doing its work on Iran to protect its own essential security interests.<sup>26</sup>

In these remarks, Pompeo neither expressly stated that the United States would abide by the provisional measures nor expressly denied that the United States would do so.<sup>27</sup> As suggested by his remarks, the United States already formally provided an exemption to sanctions "for the sale of agricultural commodities, food, medicine, or medical devices . . . or for the provision of humanitarian assistance."<sup>28</sup> Nor did Pompeo discuss the implications of the future U.S. withdrawal from the Treaty of Amity for the pending ICJ case. This withdrawal would presumably not affect the ICJ's jurisdiction over the case.<sup>29</sup> Indeed, following the United States' announcement that it will withdraw from the Treaty of Amity, on October 10 the ICJ fixed time limits for the filing of pleadings, with Iran's memorial due on April 10, 2019, and the U.S. counter-memorial due on October 10, 2019.<sup>30</sup> The withdrawal would also not prevent a finding on the merits that the United States had violated its

<sup>26</sup> Pompeo Remarks of Oct. 3, *supra* note 24; *see also* Galbraith, *supra* note 24 (quoting additional remarks by Pompeo with respect to the termination of the Treaty of Amity). When the United States withdrew from the Optional Protocol to the Vienna Convention on Consular Relations in 2005, it "emphasized that the ICJ's interpretation of the Vienna Convention was unexpected" and "that it would comply with the judgments against it that the ICJ had already issued." Laurence Helfer, *Exciting Treaties*, 91 VA. L. REV. 1579, 1628 (2005); *see also* Medellin v. Texas, 552 U.S. 491, 503 (2008) (describing President George W. Bush's efforts to comply with the ICJ judgment in the *Avena* case).

<sup>27</sup> *See* Pompeo Remarks of Oct. 3, *supra* note 24 (not providing a direct answer when asked "does the ruling of the World Court, does that have any practical impact on . . . U.S. sanctions?"). The ICJ has determined in a prior case that provisional measures are binding on the parties as a matter of international law. *LeGrand Case* (Ger. v. U.S.), Judgment, 2001 ICJ 466, paras. 98–109 (June 27), *available at* <https://www.icj-cij.org/files/case-related/104/104-20010627-JUD-01-00-EN.pdf> (concluding that provisional measures are binding in light of the power vested in the ICJ in Article 41 of the Statute of the ICJ).

<sup>28</sup> U.S. Dep't of the Treasury, Resource Center, OFAC FAQ: Iran Sanctions, FAQ Nos. 297, 318–484, *at* [https://www.treasury.gov/resource-center/faqs/Sanctions/Pages/faq\\_iran.aspx#297](https://www.treasury.gov/resource-center/faqs/Sanctions/Pages/faq_iran.aspx#297) [<https://perma.cc/R9R6-6WBS>] (discussing these exceptions and the requirements for meeting them); *see also* National Defense Authorization Act for Fiscal Year 2012, Pub. L. 112-81, at § 1245(d)(2), 125 Stat. 1298, 1648 (2011) ("The President may not impose sanctions [under another subsection of this statutory provision] with respect to any person for conducting or facilitating a transaction for the sale of agricultural commodities, food, medicine, or medical devices to Iran."); Elena Chachko, *What to Make of the ICJ's Provisional Measures in Iran v. U.S.* (Nuclear Sanctions Case), *LAWFARE* (Oct. 4, 2018) (discussing the existing U.S. exceptions and how they were raised in the ICJ proceedings).

<sup>29</sup> *See, e.g.*, *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), Judgment, 1986 ICJ 14, para. 36 (June 27) (measuring jurisdiction based on the time the case was filed and stating that "[a]n extrinsic fact such as the subsequent lapse of the Declaration [or, as in the present case also, the Treaty containing a compromissory clause], by reason of the expiry of the period or by denunciation, cannot deprive the Court of the jurisdiction already established") (quoting *Nottebohm Case* (Liech. v. Guat.), Judgment, 1953 ICJ 111, 123 (Nov. 18)) (alteration in original).

<sup>30</sup> *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights* (Iran v. U.S.), Order, 2018 ICJ (Oct. 10), *at* <https://www.icj-cij.org/files/case-related/175/175-20181010-ORD-01-00-EN.pdf>. In the week between the U.S. announcement of withdrawal from the Treaty of Amity and the order setting the pleading schedule, the United States "vigorously defend[ed]" itself in oral proceedings in the ICJ in the *Certain Iranian Assets* case, which, as noted *supra* note 14, was also brought pursuant to the Treaty of Amity. U.S. Dep't of



international legal obligations to Iran.<sup>31</sup> Should the ICJ come to reach such a finding, however, then the circumstance that the treaty will no longer be in force at the time of judgment might prove relevant for establishing the duration of the U.S. breach and for identifying the remedy.<sup>32</sup>

Amidst the ongoing ICJ proceedings and the threatened and effectuated U.S. sanctions against Iran, tensions between the countries' leaders escalated during the summer and fall of 2018. In a televised speech from Tehran on July 22, Iranian President Hassan Rouhani warned Trump not to "play with the lion's tail or else you will regret it" and, after asserting that the United States could not prevent Iran from exporting its crude oil, stated: "Peace with Iran would be the mother of all peace and war with Iran would be the mother of all wars."<sup>33</sup> In response, Trump sent the following warning to Rouhani via Twitter:

To Iranian President Rouhani: NEVER, EVER THREATEN THE UNITED STATES AGAIN OR YOU WILL SUFFER CONSEQUENCES THE LIKES OF WHICH FEW THROUGHOUT HISTORY HAVE EVER SUFFERED BEFORE. WE ARE NO LONGER A COUNTRY THAT WILL STAND FOR YOUR DEMENTED WORDS OF VIOLENCE & DEATH. BE CAUTIOUS!<sup>34</sup>

Iranian officials responded with scorn and further threats.<sup>35</sup> Although Trump has repeatedly indicated his willingness to engage in discussions with the Iranian president, Iranian leaders have rejected this possibility, citing the Trump administration's hostility and unreliability.<sup>36</sup> At the UN General Assembly in New York on September 24, President

State Press Release, On U.S. Appearance Before the International Court of Justice (Oct. 8, 2018), at <https://www.state.gov/secretary/remarks/2018/10/286504.htm> [<https://perma.cc/6966-F4DA>].

<sup>31</sup> See International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, Art. 13, cmt. 7, November 2001, Supplement No. 10 (A/56/10), chp.IV.E.1, available at [http://legal.un.org/ilc/texts/instruments/english/commentaries/9\\_6\\_2001.pdf](http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf) (stating that "once responsibility has accrued as a result of an internationally wrongful act, it is not affected by the subsequent termination of the obligation, whether as a result of the termination of the treaty which has been breached or of a change in international law").

<sup>32</sup> See *id.* Art. 14, cmt. 8 ("The consequences of a continuing wrongful act will depend on the context, as well as on the duration of the obligation breached"); see also, e.g., Case Concerning the Difference Between New Zealand and France Concerning the Interpretation of Application of Two Agreements Concluded on 9 July 1986 Between the Two States and Related to the Problems Arising from the Rainbow Warrior Affair, paras. 114–15, UNRIAA, Vol. XX (Sales No. E/F.93.V.3) (1990) (considering that reparations would be justified but not ordering cessation because "an order for the cessation or discontinuance of wrongful acts or omissions is only justified in case of continuing breaches of international obligations which are still in force at the time the judicial order is issued").

<sup>33</sup> "Do Not Play with Lion's Tail": Rouhani Warns Trump, AL JAZEERA (July 22, 2018), at <https://www.aljazeera.com/news/2018/07/play-lion-tail-rouhani-warns-trump-180722162909627.html>.

<sup>34</sup> Donald J. Trump (@realDonaldTrump), TWITTER (July 22, 2018, 8:24 PM), at <https://twitter.com/realDonaldTrump/status/1021234525626609666>.

<sup>35</sup> Erin Cunningham & Bijan Sabbagh, *After Trump Slams Iran's President, Iranian Officials Accuse Him of "Psychological Warfare,"* WASH. POST (July 23, 2018), at [https://www.washingtonpost.com/world/middle\\_east/after-trump-slams-irans-president-iranian-officials-accuse-him-of-psychological-warfare/2018/07/23/2cf18d78-023c-4be0-9e63-505b87d0047d\\_story.html](https://www.washingtonpost.com/world/middle_east/after-trump-slams-irans-president-iranian-officials-accuse-him-of-psychological-warfare/2018/07/23/2cf18d78-023c-4be0-9e63-505b87d0047d_story.html); Rick Gladstone, *Iranian General Locks Horns with Trump, Escalating Threat-Filled Feud,* N.Y. TIMES (July 26, 2018), at <https://www.nytimes.com/2018/07/26/world/middleeast/suleimani-iran-trump.html>.

<sup>36</sup> Michael D. Shear & Rick Gladstone, *Trump Says He Would Meet with Iranian Leader, but Iran Rules It Out,* N.Y. TIMES (July 30, 2018), at <https://www.nytimes.com/2018/07/30/us/politics/trump-iran-rouhani.html?ref=collection%2Fsectioncollection%2Fpolitics>.



Rouhani asserted that he would negotiate only if the United States were to begin abiding again by the terms of the JCPOA.<sup>37</sup>

On August 6, Trump issued an executive order announcing the initiation of the first phase of sanctions against Iran.<sup>38</sup> These sanctions, which included many secondary sanctions, took effect on August 7, and targeted Iran's automotive sector, its trade in gold and precious metals, and the Iranian rial.<sup>39</sup> In a statement accompanying his Executive Order, Trump announced:

The United States is fully committed to enforcing all of our sanctions . . . Individuals or entities that fail to wind down activities with Iran risk severe consequences.

I am pleased that many international firms have already announced their intent to leave the Iranian market, and several countries have indicated that they will reduce or end imports of Iranian crude oil. We urge all nations to take such steps to make clear that the Iranian regime faces a choice: either change its threatening, destabilizing behavior and reintegrate with the global economy, or continue down a path of economic isolation.<sup>40</sup>

Notwithstanding the stark effects of the first phase of U.S. sanctions on Iran's national economy,<sup>41</sup> Iran continued to comply with the JCPOA according to the International Atomic Energy Agency's certification of August 30.<sup>42</sup> In turn, the remaining signatories to the JCPOA issued a joint statement at the UN General Assembly meeting in New York on September 24 in which they confirmed their commitment to the JCPOA and "underlined their determination to protect the freedom of their economic operators to pursue legitimate business with Iran."<sup>43</sup> This position was reaffirmed in a joint statement issued by European Union foreign policy leader Federica Mogherini and the foreign and finance ministers of Britain, France, and Germany on November 2.<sup>44</sup> This statement also noted that European efforts to "preserv[e] and maint[ain] . . . effective financial channels with Iran" and "continu[e] . . . Iran's export of oil and gas" have "been intensified in recent weeks."<sup>45</sup>

<sup>37</sup> David E. Sanger, *Iran's Terms to Reopen Nuclear Talks? Trump Has to Back Down*, N.Y. TIMES (Sept. 24, 2018), at <https://www.nytimes.com/2018/09/24/world/middleeast/iran-nuclear-talks-trump-rouhani.html>.

<sup>38</sup> Exec. Order No. 13,846, 83 Fed. Reg. 38939 (Aug. 6, 2018).

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

<sup>40</sup> Donald J. Trump, Statement from the President on the Reimposition of United States Sanctions with Respect to Iran, 2018 DAILY COMP. PRES. DOC. NO. 523 (Aug. 6).

<sup>41</sup> The first phase of sanctions instituted by the Trump administration against Iran's non-energy related markets "provoke[ed] an exodus of international firms from Iran and contribut[ed] to a dramatic decline in the value of Iran's currency." Tamer El-Ghobashy, *U.N. Watchdog Says Iran Continues To Comply with Nuclear Restrictions Despite U.S. Pullout*, WASH. POST (Aug. 30, 2018), at [https://www.washingtonpost.com/world/2018/08/30/un-watchdog-says-iran-continues-comply-with-nuclear-restrictions-despite-us-pullout/?utm\\_term=.5ac6492c968c](https://www.washingtonpost.com/world/2018/08/30/un-watchdog-says-iran-continues-comply-with-nuclear-restrictions-despite-us-pullout/?utm_term=.5ac6492c968c).

<sup>42</sup> Int'l Atomic Energy Agency [IAEA], Verification and Monitoring in the Islamic Republic of Iran in Light of United Nations Security Council Resolution 2231 (2015), IAEA Doc. GOV/2018/33 (Aug. 30, 2018).

<sup>43</sup> European External Action Serv. Press Release, Implementation of the Joint Comprehensive Plan of Action: Joint Ministerial Statement, para. 6 (Sept. 24, 2018), at [https://eeas.europa.eu/headquarters/headquarters-homepage/51036/implementation-joint-comprehensive-plan-action-joint-ministerial-statement\\_en](https://eeas.europa.eu/headquarters/headquarters-homepage/51036/implementation-joint-comprehensive-plan-action-joint-ministerial-statement_en).

<sup>44</sup> European External Action Serv. Press Release, Joint Statement by High Representative Federica Mogherini and Foreign Ministers Jean-Yves Le Drian et al. (Nov. 2, 2018), at [https://eeas.europa.eu/headquarters/headquarters-homepage/53230/joint-statement-high-representative-federica-mogherini-and-foreign-ministers-jean-yves-le\\_en](https://eeas.europa.eu/headquarters/headquarters-homepage/53230/joint-statement-high-representative-federica-mogherini-and-foreign-ministers-jean-yves-le_en).

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

It placed particular emphasis on a “European initiative” designed to bypass the reach of sanctions on Iran and European exporters and importers by creating a “Special Purpose Vehicle.”<sup>46</sup>

Over the summer of 2018, a State Department official indicated that the United States might grant “case-by-case” extensions to countries with regard to its re-imposition of secondary sanctions.<sup>47</sup> On November 2, the Trump administration announced that it would grant “temporary allotments” to eight jurisdictions, “but only because they have demonstrated significant reductions in their crude oil and cooperation on many other fronts and have made important moves towards getting to zero crude oil importation.”<sup>48</sup> These eight jurisdictions—China, India, Greece, Italy, Taiwan, Japan, Turkey, and South Korea—will receive temporary waivers from the secondary sanctions with respect to their nation’s oil imports.<sup>49</sup>

The second phase of United States sanctions against Iran went into effect on November 5, signaling the “complet[ion]” of “the termination of United States participation in the Iran nuclear deal.”<sup>50</sup> In announcing this second phase, Trump noted that “we reiterate today that the sale of food, medicine, medical devices, and agricultural commodities to Iran has long been, and remains, exempt from the sanctions.”<sup>51</sup> He emphasized, however, that all remaining sanctions that had been lifted pursuant to the JCPOA were re-imposed, including those related to “Iran’s energy, shipping, and shipbuilding sectors, and sanctions targeting transactions with the Central Bank of Iran and sanctioned Iranian banks.”<sup>52</sup> In addition, the United States added hundreds of targets to the Specially Designated Nationals and Blocked Persons List.<sup>53</sup>

In remarks on November 5, Pompeo stated that “[t]he Iranian regime has a choice. It can either do a 180-degree turn from its outlaw course of action and act like a normal country, or it can see its economy crumble.”<sup>54</sup> Rouhani responded defiantly, asserting “[w]e should break

<sup>46</sup> *Id.* This “Special Purpose Vehicle” would work to shield foreign companies from the U.S. sanctions by providing an alternative method for companies to move money in and out of Iran rather than relying on Western banks. Peter Eavis, *Europe Plans a Way to Evade Sanctions on Iran. Will It Work?*, N.Y. TIMES (Oct. 4, 2018), at <https://www.nytimes.com/2018/10/04/business/dealbook/iran-sanctions-europe.html>; see also Steven Erlanger, *As U.S. Sanctions on Iran Kick In, Europe Looks for a Workaround*, N.Y. TIMES (Nov. 5, 2018), at <https://www.nytimes.com/2018/11/05/world/europe/us-iran-sanctions-europe.html>.

<sup>47</sup> See Gardiner Harris, *U.S. Softens Demand That Countries Stop All Iran Oil Imports*, N.Y. TIMES (July 2, 2018), at <https://www.nytimes.com/2018/07/02/world/middleeast/us-iran-oil-imports-sanctions-.html>.

<sup>48</sup> U.S. Dep’t of State Press Release, Briefing on Iran Sanctions (Nov. 2, 2018), at <https://www.state.gov/secretary/remarks/2018/11/287090.htm> [<https://perma.cc/C7NT-XEGE>]; see also Gardiner Harris, *U.S. Reimposes Sanctions on Iran but Undercuts the Pain with Waivers*, N.Y. TIMES (Nov. 2, 2018), at <https://www.nytimes.com/2018/11/02/world/middleeast/us-iran-sanctions-oil-waivers.html>.

<sup>49</sup> Harris, *supra* note 48 (reporting that these waivers have an initial term of six months).

<sup>50</sup> Donald J. Trump, Statement by the President Regarding the Reimposition of Nuclear-Related Sanctions on Iran (Nov. 2, 2018), at <https://www.whitehouse.gov/briefings-statements/statement-president-regarding-reimposition-nuclear-related-sanctions-iran/> [<https://perma.cc/7PNL-BKRN>].

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> U.S. Dep’t of Treas. Press Release, U.S. Government Fully Re-Imposes Sanctions on the Iranian Regime as Part of Unprecedented U.S. Economic Pressure Campaign (Nov. 5, 2018), at <https://home.treasury.gov/news/press-releases/sm541> [<https://perma.cc/G2JG-T2M6>].

<sup>54</sup> U.S. Dep’t of State, Press Availability of Secretary of State Mike Pompeo with Secretary of Treasury Steven T. Mnuchin (Nov. 5, 2018), at <https://www.state.gov/secretary/remarks/2018/11/287132.htm> [<https://perma.cc/6MNL-BU6A>].

the sanctions very well, and we will do that.”<sup>55</sup> He said that Iran is engaged in an “economic war” with the United States and that the Americans “must be punished once and for all” for their “language of force, pressure, and threats to speak to the great Iranian nation.”<sup>56</sup> On November 12, 2018, the IAEA once again reported that Iran remained compliant with the JCPOA.<sup>57</sup>

<sup>55</sup> *Iran Will Break US Sanctions: President Rouhani*, PRESSTV (Nov. 5, 2018), at <https://www.presstv.com/Detail/2018/11/05/579118/Iran-US-sanctions-President-Rouhani-break-sanction>.

<sup>56</sup> *Id.*

<sup>57</sup> Int’l Atomic Energy Agency [IAEA], Verification and Monitoring in the Islamic Republic of Iran in Light of United Nations Security Council Resolution 2231 (2015), IAEA Doc. GOV/2018/47 (Nov. 12, 2018).