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### Contemporary Practice of the United States Relating to International Law (113:2 Am J Int'l L)

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

EDITED BY JEAN GALBRAITH\*

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\* 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 Tightens Procedures with Respect to Asylum Seekers at the Southern Border*  
doi:10.1017/ajil.2019.13

The Trump administration undertook a variety of actions related to the southern U.S. border in late 2018 and early 2019. Pointing to the progress of thousands of migrants traveling together from Central America to the U.S. border, President Trump deployed troops to the border and issued a proclamation providing that access to asylum would only be available at the southern border to those who entered through an authorized port of entry. Legal challenges to this proclamation and its implementation by the Department of Homeland Security (DHS) immediately followed, and a federal district court issued a temporary restraining order on November 19 and a preliminary injunction on December 19 against its enforcement. In addition, after ongoing negotiations with Mexico, the Trump administration announced that it would implement an arrangement under which asylum seekers would await their court date in Mexico rather than the United States. These ongoing developments are part of broader attempts by the Trump administration to erect barriers to migration across the southern border.

In his first week in office, Trump issued an executive order directing executive departments and agencies “to deploy all lawful means to secure the Nation’s southern border, to prevent further illegal immigration into the United States, and to repatriate illegal aliens swiftly, consistently, and humanely.”<sup>1</sup> In a memorandum issued on April 6, 2018, then Attorney General Sessions announced the Trump administration’s “zero-tolerance policy” regarding the unauthorized entry of immigrants at the southern border.<sup>2</sup> In the weeks following, the Trump administration effectuated this policy by generally detaining adults who entered without authorization and thereby separating families at the border.<sup>3</sup> Met with outrage and a swift legal challenge,<sup>4</sup> this use of family separation was brought to an end on June 20 when Trump issued an executive order stating that the “policy of this Administration [is] to maintain family unity . . . .”<sup>5</sup>

Following the controversy surrounding the Trump administration’s family separation practices, news of a “migrant caravan” traveling from Central America toward the United

<sup>1</sup> Exec. Order No. 13,767, 82 Fed. Reg. 8793 (Jan. 25, 2017).

<sup>2</sup> Jeff Sessions, Office of the Attorney General, Memorandum from the Attorney General to Federal Prosecutors Along the Southwest Border (Apr. 6, 2018), at <https://www.justice.gov/opa/press-release/file/1049751/download> [<https://perma.cc/QN2C-NLSD>]. In a press release about the announcement, Sessions declared that “a crisis has erupted at our Southwest Border that necessitates an escalated effort to prosecute those who choose to illegally cross our border . . . .” U.S. Dep’t of Justice Press Release, Attorney General Announces Zero-Tolerance Policy for Criminal Illegal Entry (Apr. 6, 2018), at <https://www.justice.gov/opa/pr/attorney-general-announces-zero-tolerance-policy-criminal-illegal-entry> [<https://perma.cc/VZ8Z-6RZP>].

<sup>3</sup> Brian Naylor, *DHS: Nearly 2,000 Children Separated from Adults at Border in 6 Weeks*, NPR (June 16, 2018), at <https://www.npr.org/2018/06/16/620451012/dhs-nearly-2-000-children-separated-from-adults-at-border-in-six-weeks>. For additional context about the separation of families under the zero-tolerance policy, see Jean Galbraith, *Contemporary Practice of the United States*, 112 *AJIL* 745, 748–49 (2018).

<sup>4</sup> See *L. v. U.S. Immigration & Customs Enft*, 310 F. Supp. 3d 1133, 1149 (S.D. Cal. 2018) (issuing a preliminary injunction halting the practice of separating families at the border and ordering the government to reunite separated children with their parents in a designated time period).

<sup>5</sup> Exec. Order No. 13,841, 83 Fed. Reg. 29435 (June 20, 2018).

States' southern border erupted in the media and "dr[ew] the ire of President Trump."<sup>6</sup> Initially a single group of less than two hundred migrants that formed in San Pedro Sula, Honduras, in mid-October 2018, the caravan eventually swelled to include several thousand migrants and splintered into smaller groups as it made its journey northward.<sup>7</sup> On October 18, the government of Mexico requested additional support from the United Nations to process the anticipated influx of individuals seeking to apply for asylum,<sup>8</sup> a move that the United States supported.<sup>9</sup> As news of the caravan surged in the media and "triggered reactions and hostile measures by some authorities in transit and destination countries," the Inter-American Commission on Human Rights (IACHR) "expresse[d] concern" over the "human rights violations and abuses" faced by the migrants and "urge[d] the States concerned to adopt measures to guarantee the human rights of these individuals . . ."<sup>10</sup>

In preparation for the arrival of the caravan at the southern border of the United States, Department of Defense (DOD) officials fulfilled Trump's wish to "bring[] out the military for this National Emergency"<sup>11</sup> by deploying over 5,200 active-duty troops to the Mexican border.<sup>12</sup> The active-duty deployment was intended to supplement Operation Guardian

<sup>6</sup> Kirk Semple, *What Is the Migrant Caravan and Why Does Trump Care?*, N.Y. TIMES (Oct. 18, 2018), at <https://www.nytimes.com/2018/10/18/world/americas/trump-migrant-caravan.html> [hereinafter Caravan Article]. Taking to Twitter, Trump described the caravan as an "assault on our country" replete with "[m]any Gang Members and some very bad people" and threatened the governments of Honduras, El Salvador, and Guatemala that "if they allow their citizens, or others, to journey through their borders and up to the United States, with the intention of entering our country illegally, all payments made to them will STOP (END)!" Donald J. Trump (@realDonaldTrump), TWITTER (Oct. 29, 2018, 7:41 AM), at <https://twitter.com/realDonaldTrump/status/1056919064906469376> [<https://perma.cc/8NUP-BV98>]; Donald J. Trump (@realDonaldTrump), TWITTER (Oct. 16, 2018, 6:19 PM), at <https://twitter.com/realdonaldtrump/status/1052368431201341447> [<https://perma.cc/RAY8-H6N8>]; see also Donald J. Trump (@realDonaldTrump), TWITTER (Oct. 18, 2018, 4:25 AM), at <https://twitter.com/realdonaldtrump/status/1052883467430694912> [<https://perma.cc/T4HX-48XL>]. Rather than ceasing foreign aid to Honduras, El Salvador, and Guatemala, however, the Trump administration pledged on December 18 to invest \$5.8 billion in these countries to "promote institutional reforms and development in the Northern Triangle." U.S. Dep't of State Press Release, *The U.S. Strategy for Central America and Southern Mexico* (Dec. 18, 2018), at <https://www.state.gov/r/pa/prs/ps/2018/12/288168.htm> [<https://perma.cc/KT4F-J9NC>].

<sup>7</sup> Caravan Article, *supra* note 6.

<sup>8</sup> For an overview of the UNHCR's involvement in Mexico with respect to the migrant caravan, see UNHCR Situation Update, *Response to Arrivals of Asylum-Seekers from the North of Central America* (Nov. 14, 2018), available at [http://reporting.unhcr.org/sites/default/files/UNHCR%20Situation%20Update%20on%20NCA%20EN%20-%202014NOV18\\_0.PDF](http://reporting.unhcr.org/sites/default/files/UNHCR%20Situation%20Update%20on%20NCA%20EN%20-%202014NOV18_0.PDF).

<sup>9</sup> U.S. Dep't of State Press Release, *Mexico Requests UNHCR Assistance to Process Migrants* (Oct. 18, 2018), at <https://www.state.gov/secretary/remarks/2018/10/286769.htm> [<https://perma.cc/NA27-BKLW>].

<sup>10</sup> IACHR Press Release, *IACHR Expresses Concern Over the Situation of the "Migrant Caravan" from Honduras and Calls on the States of the Region to Adopt Measures for their Protection* (Oct. 23, 2018), at [http://www.oas.org/en/iachr/media\\_center/PReleases/2018/225.asp](http://www.oas.org/en/iachr/media_center/PReleases/2018/225.asp) (further stating that "the IACHR rejects the use of stigmatizing and criminalizing language and unfounded accusations in reference to migrants and asylum seekers, which may encourage xenophobic attitudes against such persons").

<sup>11</sup> Donald J. Trump (@realDonaldTrump), TWITTER (Oct. 25, 2018, 4:05 AM), at <https://twitter.com/realDonaldTrump/status/1055414972635926528> [<https://perma.cc/L27S-SANP>].

<sup>12</sup> Jim Garamone, *5,200 Active-Duty Personnel Moving to Southwest Border, Northcom Chief Says*, U.S. DEP'T OF DEFENSE (Oct. 29, 2018), at <https://dod.defense.gov/News/Article/Article/1675810/5200-active-duty-personnel-moving-to-southwest-border-northcom-chief-says> [<https://perma.cc/99CR-AJYX>] [hereinafter Deployment Announcement]. Originally dubbed Operation Faithful Patriot, the mobilization was designed to "harden the southern border" and included, in addition to the troops, three combat engineer battalions, members of the U.S. Army Corps of Engineers, military helicopters, and military police units. *Id.*

Support, a mission initiated in April<sup>13</sup> that involved the deployment of over two thousand National Guard troops to the southern border.<sup>14</sup> DOD officials testified to the House Armed Services Committee on January 29, 2019, that “our military’s presence and support have served to increase the effectiveness of” Customs and Border Protection (CBP) in its “border security operation by enabling them to focus on their law enforcement duties at our ports of entry.”<sup>15</sup> Undersecretary of Defense for Policy John Rood emphasized that “military support has been, and will continue to be provided consistent with the law, including the Posse Comitatus Act.”<sup>16</sup>

Although CBP determined that “the likelihood of violence” directed against federal agents along the border would be “minimal,”<sup>17</sup> Chief of Staff John Kelly signed a “decision memorandum” on November 20 authorizing U.S. service members at the border to use “a show or use of force (including lethal force, where necessary), crowd control, temporary detention, and cursory search” to protect CBP agents.<sup>18</sup> In addition, the Standing Rules for the Use of Force for U.S. Forces authorize military members to “exercise individual self-defense in response to a hostile act or demonstrated hostile intent.”<sup>19</sup> According to the *CBP Use of Force Policy Handbook*, CBP agents are authorized to use “less-lethal force”<sup>20</sup> if such force is “both objectively reasonable and necessary in order to carry out the Authorized Officer’s/Agent’s law enforcement duties.”<sup>21</sup> Agents may use deadly force “only when

<sup>13</sup> On April 4, 2018, Trump signed a memorandum entitled “Securing the Southern Border of the United States” in which he asserted that “[t]he security of the United States is imperiled by a drastic surge of illegal activity on the southern border” and directed the secretary of defense to “support the Department of Homeland Security in securing the southern border and taking other necessary actions to stop the flow of deadly drugs and other contraband, gang members and other criminals, and illegal aliens into this country.” Donald J. Trump, Memorandum on Securing the Southern Border of the United States, 2018 DAILY COMP. PRES. DOC. NO. 218 (Apr. 4). Trump authorized the Secretary of Defense to “request use of National Guard personnel to assist in fulfilling this mission” and to “use such other authorities as appropriate and consistent with applicable law.” *Id.*

<sup>14</sup> Deployment Announcement, *supra* note 12.

<sup>15</sup> Jim Garamone, *DOD Officials Testify on Military Support to Southwest Border*, U.S. DEP’T OF DEFENSE (Jan. 29, 2019), at <https://dod.defense.gov/News/Article/Article/1743120/dod-officials-testify-on-military-support-to-southwest-border> [<https://perma.cc/ZC34-R6RT>] (quoting Joint Staff Director of Operations Michael Gilday).

<sup>16</sup> *Id.* The Posse Comitatus Act states: “Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined under this title or imprisoned not more than two years, or both.” 18 U.S.C. § 1385; see generally Matt Matthews, *The Posse Comitatus Act and the United States Army: A Historical Perspective* (Global War on Terrorism Paper 14, 1959), available at <https://www.armyupress.army.mil/Portals/7/combat-studies-institute/csi-books/matthews.pdf> (discussing the origins of the Posse Comitatus Act and the limits it places on military involvement in law enforcement operations).

<sup>17</sup> Ron Nixon, Helene Cooper & Thomas Gibbons-Neff, *Homeland Security Dept. Finds “Minimal” Risk to Border Guards, Undercutting Trump Plan*, N.Y. TIMES (Nov. 20, 2018), at <https://www.nytimes.com/2018/11/20/us/politics/military-border-patrol-migrants.html> (quoting an internal CBP document).

<sup>18</sup> James Laporta, *Donald Trump Signs Authorization for Border Troops Using Lethal Force as Migrant Caravan Approaches, Document Reveals*, NEWSWEEK (Nov. 21, 2018), at <https://www.newsweek.com/donald-trump-memo-migrant-caravan-border-troops-1226945> (including the full text of the memorandum).

<sup>19</sup> Chairman of the Joint Chief of Staffs, *Standing Rules of Engagement/Standing Rules for the Use of Force for US Forces*, at 2 (June 13, 2005), available at <http://www.jag.navy.mil/distrib/instructions/CJCS1%203121.01B13Jun05.pdf>.

<sup>20</sup> “Less-lethal force” is defined as “force that is not likely to cause serious physical injury or death.” U.S. Customs and Border Protection Office of Training and Development, *Use of Force Policy, Guidelines and Procedures Handbook*, at 3 (May 2014), available at <https://www.cbp.gov/sites/default/files/documents/UseofForcePolicyHandbook.pdf>.

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

necessary, that is, when the officer/agent has a reasonable belief that the subject of such force poses an imminent danger of serious physical injury or death to the officer/agent or to another person.”<sup>22</sup> On two known occasions in late 2018 and early 2019, U.S. border agents shot tear gas across the border toward crowds of migrants, including children.<sup>23</sup> After the second incident, the Mexican government sent a diplomatic note to the U.S. Embassy in which it “deplore[d] the occurrence of any sort of violent act on the border with Mexico” and requested a “thorough investigation” into the circumstances of the incidents.<sup>24</sup>

In addition to the deployment of troops, the Trump administration also acted to tighten the process for asylum seekers. On November 9, 2018, Trump issued the Presidential Proclamation “Addressing Mass Migration Through the Southern Border of the United States.”<sup>25</sup> In this proclamation, Trump limited access to asylum at the southern border to those crossing at an official port of entry:

I am similarly acting to suspend . . . the entry of certain aliens in order to address the problem of large numbers of aliens traveling through Mexico to enter our country unlawfully or without proper documentation. I am tailoring the suspension to channel these aliens to ports of entry, so that, if they enter the United States, they do so in an orderly and controlled manner instead of unlawfully. Under this suspension, aliens entering through the southern border, even those without proper documentation, may, consistent with this proclamation, avail themselves of our asylum system, provided that they properly present themselves for inspection at a port of entry . . . .

But aliens who enter the United States unlawfully through the southern border in contravention of this proclamation will be ineligible to be granted asylum under the regulation promulgated by the Attorney General and the Secretary of Homeland Security that became effective earlier today.<sup>26</sup>

This suspension was initially for a ninety-day period, which Trump subsequently extended for another ninety-day period on February 7, 2019.<sup>27</sup> As authority for this suspension, Trump pointed to Section 212(f) of the Immigration and Nationality Act (INA), which authorizes the president to “suspend the entry of all aliens” following a finding that “the entry of any aliens or of any class of aliens into the United States would be detrimental to

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

<sup>23</sup> The first incident occurred on November 25, 2018, and the second on January 1, 2019. Megan Specia & Rick Gladstone, *Border Agents Shot Tear Gas into Mexico. Was It Legal?*, N.Y. TIMES (Nov. 28, 2018), at <https://www.nytimes.com/2018/11/28/world/americas/tear-gas-border.html>; Alan Yuhas, *U.S. Agents Fire Tear Gas Across Mexican Border*, N.Y. TIMES (Jan. 1, 2019), at <https://www.nytimes.com/2019/01/01/world/americas/migrants-border-tear-gas.html>.

<sup>24</sup> Mex. Secretaría de Relaciones Exteriores Press Release, *Mexico Asks for an Investigation into Incident at Tijuana-San Diego Border* (Jan. 3, 2019), at <https://www.gob.mx/sre/prensa/mexico-asks-for-an-investigation-into-incident-at-tijuana-san-diego-border>.

<sup>25</sup> Proclamation No. 9822, 83 Fed. Reg. 57,661 (Nov. 9, 2018) [hereinafter *Entry Suspension Proclamation*].

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

<sup>27</sup> *Id.*; Proclamation No. 9842, 84 Fed. Reg. 3665 (Feb. 7, 2019). By its terms, the suspension would end earlier if the United States reached a deal with Mexico to allow asylum seekers to seek asylum in Mexico rather than the United States. *Entry Suspension Proclamation*, *supra* note 25; *see also* 8 U.S.C. 1158(a)(2)(A) (limiting asylum protections where the United States had an international agreement with a “safe third country” that would take in the asylum seekers).

the interests of the United States . . . .”<sup>28</sup> Trump had previously relied on this section of the INA in enacting his travel ban against immigrants and non-immigrants seeking to enter the United States from a handful of predominantly Muslim countries; the third iteration of this travel ban was upheld by the Supreme Court on June 26, 2018.<sup>29</sup>

On the same date of publication of this proclamation, DHS and the Executive Office for Immigration Review (EOIR) published an interim final rule “governing asylum claims in the context of aliens who are subject to, but contravene, a suspension or limitation on entry into the United States through the southern border with Mexico . . . .”<sup>30</sup> According to the interim final rule:

[T]he Departments are amending their respective existing regulations to provide that aliens subject to such a proclamation concerning the southern border, but who contravene such a proclamation by entering the United States after the effective date of such a proclamation, are ineligible for asylum. The interim rule, if applied to a proclamation suspending the entry of aliens who cross the southern border unlawfully, would bar such aliens from eligibility for asylum and thereby channel inadmissible aliens to ports of entry, where they would be processed in a controlled, orderly, and lawful manner.<sup>31</sup>

Within hours of the proclamation and accompanying regulation, the American Civil Liberties Union filed a lawsuit on behalf of several nonprofit immigrant rights organizations in the federal district court for the Northern District of California.<sup>32</sup> The complaint alleged that the proclamation and interim final rule are “unlawful and invalid” as contrary to both the INA and Administrative Procedure Act (APA).<sup>33</sup> Section 208 of the INA provides that “[a]ny alien who is physically present in the United States or who arrives in the United States (*whether or not at a designated port of arrival . . .*), irrespective of such alien’s status, may apply for asylum . . . .”<sup>34</sup> The plaintiffs argued that the proclamation and interim final rule are “in direct violation of Congress’s clear command that manner of entry cannot constitute a categorical asylum bar.”<sup>35</sup> The plaintiffs separately argued that the Acting Attorney General and Secretary of Homeland Security promulgated the rule without the requisite procedural steps under the APA.<sup>36</sup> The plaintiffs requested declaratory relief and a “preliminary and permanent injunction enjoining Defendants, their officials, agents, employees, assigns,

<sup>28</sup> 8 U.S.C. § 1182(f).

<sup>29</sup> *Trump v. Hawaii*, 138 S. Ct. 2392 (2018). For more details, see Jean Galbraith, *Contemporary Practice of the United States*, 112 AJIL 741 (2018).

<sup>30</sup> *Aliens Subject to a Bar on Entry Under Certain Presidential Proclamations; Procedures for Protection Claims*, 83 Fed. Reg. 55934 (Nov. 9, 2018) [hereinafter *Asylum Ban Interim Rule*].

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

<sup>32</sup> *Complaint for Declaratory and Injunctive Relief, E. Bay Sanctuary Covenant v. Trump*, No. 18-CV-06810-JST (N.D. Cal. Nov. 9, 2018), available at [https://www.splcenter.org/sites/default/files/al\\_otro\\_lado\\_v\\_trump\\_administration.pdf](https://www.splcenter.org/sites/default/files/al_otro_lado_v_trump_administration.pdf) [hereinafter *Asylum Lawsuit Complaint*].

<sup>33</sup> *Id.* at 17.

<sup>34</sup> 8 U.S.C.A. § 1158(a)(1) (emphasis added).

<sup>35</sup> *Asylum Lawsuit Complaint*, *supra* note 32, at 1.

<sup>36</sup> The APA requires federal agencies promulgating substantive rules to publish a “[g]eneral notice of proposed rulemaking” and allow for a comment period. 5 U.S.C. § 553(b)–(c). The APA further requires that the effective date of any substantive rule be delayed thirty days from the date of its publication. *Id.*, § 553(d). The government did not follow these procedures, but claimed exemptions from these requirements under the “military or foreign affairs function” exception of § 553(a)(1) and the “good cause” exemptions contained in § 553(b)(B) and

and all persons acting in concert or participating with them from implementing or enforcing the Proclamation or interim final rule.”<sup>37</sup>

On November 19, the district court judge granted the plaintiffs’ motion for a temporary restraining order and denied a stay pending appeal, temporarily barring the proclamation and interim rule from taking effect.<sup>38</sup> The court stated:

The rule barring asylum for immigrants who enter the country outside a port of entry irreconcilably conflicts with the INA and the expressed intent of Congress. Whatever the scope of the President’s authority, he may not rewrite the immigration laws to impose a condition that Congress has expressly forbidden . . . Also, Plaintiffs and the immigrants they represent will suffer irreparable injury if the rule goes into effect pending resolution of this case.<sup>39</sup>

Following this order, the government filed an emergency motion for a stay pending appeal to the Ninth Circuit Court of Appeals. The Ninth Circuit denied the government’s motion on December 7, stating:

The Government argues that it is likely to succeed on the merits of its appeal because the Rule (1) is consistent with the INA’s asylum provisions and (2) was properly promulgated. We respectfully disagree. Although the merits of the procedural issue may be uncertain at this stage of proceedings, the Government is not likely to succeed in its argument that the Rule is consistent with the INA.<sup>40</sup>

On December 19, the district court judge granted the plaintiffs a preliminary injunction.<sup>41</sup> The Trump administration responded to these court orders with hostility: in response to the district court’s grant of a temporary restraining order, Press Secretary Sarah Huckabee Sanders stated that the decision was a result of “activist judges imposing their open borders policy preferences, which are rejected by the overwhelming majority of the American people, and interfering with the executive branch’s authority to administer the immigration system in a manner that ensures the Nation’s safety, security, and the rule of law.”<sup>42</sup> In response to the order granting a preliminary injunction, Sanders stated: “Today’s ruling is only the latest example of judicial activism that encourages migrants to take dangerous risks; empowers criminal organizations that spread turmoil in our hemisphere; and undermines the laws, borders, Constitution, and sovereignty of the United States.”<sup>43</sup> On December 21, the

§ 553(d)(3). *E. Bay Sanctuary Covenant v. Trump*, No. 18-CV-06810-JST, 349 F. Supp. 3d 838, 846 (N.D. Cal. Nov. 19, 2018) [hereinafter *Asylum Lawsuit TRO Decision*]

<sup>37</sup> *Asylum Lawsuit Complaint*, *supra* note 32, at 17.

<sup>38</sup> *Asylum Lawsuit TRO Decision*, *supra* note 36.

<sup>39</sup> *Id.* at \*1; *see also id.* at \*16–\*17 (also finding “serious questions” with respect to whether the APA exceptions were available to the government).

<sup>40</sup> *E. Bay Sanctuary Covenant v. Trump*, 909 F.3d 1219, 1246 (9th Cir. 2018) [hereinafter *Ninth Circuit Decision Regarding a Stay*].

<sup>41</sup> *E. Bay Sanctuary Covenant v. Trump*, No. 18-CV-06810-JST, \_\_\_ F. Supp. 3d \_\_\_ 2018 WL 6660080 (N.D. Cal. Dec. 19, 2018).

<sup>42</sup> White House Press Release, Statement from the Press Secretary (Nov. 20, 2018), at <https://www.whitehouse.gov/briefings-statements/statement-press-secretary-41> [<https://perma.cc/3MUF-99Q9>].

<sup>43</sup> White House Press Release, Statement from the Press Secretary (Dec. 19, 2018), at <https://www.whitehouse.gov/briefings-statements/statement-press-secretary-43> [<https://perma.cc/T73P-SMDX>].

government's application to the Supreme Court for a stay was denied, although four of the nine justices would have granted this application.<sup>44</sup>

In denying the government's motion on December 7, the Ninth Circuit noted the government's international legal obligations to accept asylum seekers and observed that "the rule of decision enforced by the Government—that illegal entry, through Mexico specifically, will always be disqualifying—is inconsistent with [these] treaty obligations . . . ."<sup>45</sup> The United States acceded to the 1967 Protocol Relating to the Status of Refugees (Protocol) on November 1, 1968.<sup>46</sup> According to a provision of the 1951 UN Convention Relating to the Status of Refugees incorporated into the Protocol, state parties

shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.<sup>47</sup>

State parties cannot expel refugees "save on grounds of national security or public order"<sup>48</sup> and are prohibited by the principle of *non-refoulement* from returning a refugee "to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."<sup>49</sup> As a "reflect[ion]" of "the primary responsibility for protection of the state in which a person arrives and seeks international protection," the Office of the UN High Commissioner for Refugees (UNHCR) has stated that "ensuring refugee protection and access to human rights for individual refugees is the responsibility of the state where the refugees are . . . ."<sup>50</sup> With respect to the transfer of refugees or asylum seekers to a "safe third country," the UNHCR has indicated that such an arrangement is acceptable so long as it is established, as a "precondition" to such transfer, that the refugee or asylum seeker "has access in that country to standards of treatment commensurate with the 1951 Convention, its 1967 Protocol and international human rights standards."<sup>51</sup>

The United States has been and remains in discussions with Mexico over the creation of an agreement providing that Mexico constitutes a "safe third country" to which the United

<sup>44</sup> *Trump v. E. Bay Sanctuary Covenant*, No. 18A615, 2018 WL 6713079, at \*1 (U.S. Dec. 21, 2018) (noting that Justices Thomas, Alito, Gorsuch, and Kavanaugh would have granted the stay application).

<sup>45</sup> Ninth Circuit Decision Regarding a Stay, *supra* note 40, at 1249.

<sup>46</sup> UN Treaty Collection, Depository Status for the Protocol Relating to the Status of Refugees, at [https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg\\_no=V-5&chapter=5&lang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=V-5&chapter=5&lang=en); see also 114 Cong. Rec. 29577, 29607 (1968) (documenting the Senate's resolution of advice and consent).

<sup>47</sup> United Nations Protocol Relating to the Status of Refugees, Art. 1(1), Jan. 31, 1967, 606 UNTS 267 (incorporating United Nations Convention Relating to the Status of Refugees, Art. 31(1), July 28, 1951, 189 UNTS 150).

<sup>48</sup> *Id.* (incorporating UN Convention Relating to the Status of Refugees, Art. 32(1)).

<sup>49</sup> *Id.* (incorporating UN Convention Relating to the Status of Refugees, Art. 33(1)).

<sup>50</sup> UN High Commissioner for Refugees (UNHCR), Legal Considerations Regarding Access to Protection and a Connection Between the Refugee and the Third Country in the Context of Return or Transfer to Safe Third Countries, para. 2 (Apr. 2018), at <https://www.refworld.org/docid/5acb33ad4.html>.

<sup>51</sup> *Id.*, para. 7.

States can refer Central American asylum seekers.<sup>52</sup> In addition, for several months surrounding the arrival of the migrant caravan, the two countries negotiated over the prospect of implementing a policy under which asylum seekers would remain in Mexico while they await their immigration court dates in the United States.<sup>53</sup> Although the previous Mexican administration was resistant to such a policy, officials in the incoming administration under President Andres Manuel López Obrador, sworn in on December 1, signaled that they were potentially more receptive to it.<sup>54</sup>

On December 20, Secretary of Homeland Security Nielson announced that the United States would be invoking Section 253(b)(2)(C) of the INA, which applies to aliens arriving by land “from a foreign territory contiguous to the United States” and authorizes the attorney general to “return the alien to that territory” pending removal proceedings.<sup>55</sup> Describing this initiative, entitled “Migration Protection Protocols,” as “historic action to confront the illegal immigration crisis facing the United States,” Nielson explained that “individuals arriving in or entering the United States from Mexico—illegally or without proper documentation—may be returned to Mexico for the duration of their immigration proceedings.”<sup>56</sup>

Although Mexico did not formally agree to this development,<sup>57</sup> it acknowledged in a statement that it

will authorize, for humanitarian reasons and temporarily, the entry of certain foreign persons from the United States who have entered the country through a port of entry or who have been apprehended between ports of entry, have been interviewed by the authorities of migratory control of that country, and have received a summons to appear before an immigration judge . . . . They will be entitled to equal treatment without any discrimination and with due respect to their human rights, as well as the opportunity to apply for a work permit so they can find paid jobs, which will allow them to meet their basic needs.<sup>58</sup>

The Trump administration announced on January 24, 2019, that it would begin implementing this new policy,<sup>59</sup> and the first Central American migrant seeking asylum in the

<sup>52</sup> See *supra* note 27 (discussing the applicable INA provision); Joshua Partlow & Nick Miroff, *U.S. and Mexico Discussing a Deal That Could Slash Migration at the Border*, N.Y. TIMES (July 10, 2018), at [https://www.washingtonpost.com/world/the\\_americas/us-and-mexico-discussing-a-deal-that-could-slash-migration-at-the-border/2018/07/10/34e68f72-7ef2-11e8-a63f-7b5d2aba7ac5\\_story.html?utm\\_term=.6d607da46f13](https://www.washingtonpost.com/world/the_americas/us-and-mexico-discussing-a-deal-that-could-slash-migration-at-the-border/2018/07/10/34e68f72-7ef2-11e8-a63f-7b5d2aba7ac5_story.html?utm_term=.6d607da46f13).

<sup>53</sup> Azam Ahmed & Kirk Semple, *Mexico Mulls Allowing Migrants to Stay There Pending U.S. Asylum Bids*, N.Y. TIMES (Nov. 24, 2018), at <https://www.nytimes.com/2018/11/24/world/americas/mexico-migrant-crisis.html>.

<sup>54</sup> *Id.*

<sup>55</sup> 8 U.S.C.A. § 1225(b)(2)(C).

<sup>56</sup> U.S. Dep’t of Homeland Security Press Release, Secretary Kirstjen M. Nielsen Announces Historic Action to Confront Illegal Immigration (Dec. 20, 2018), at <https://www.dhs.gov/news/2018/12/20/secretary-nielsen-announces-historic-action-confront-illegal-immigration> [<https://perma.cc/7B8P-EL2D>].

<sup>57</sup> Nick Miroff, Kevin Sieff & Mary Beth Sheridan, *Trump Administration Reaches Deal That Will Force Asylum Seekers to Wait in Mexico as Cases are Processed, DHS’s Nielsen Says*, WASH. POST (Dec. 20, 2018), at [https://www.washingtonpost.com/world/national-security/dhs-secretary-kirstjen-nielsen-to-face-questions-from-lawmakers/2018/12/20/f7d2ffea-0460-11e9-8186-4ec26a485713\\_story.html](https://www.washingtonpost.com/world/national-security/dhs-secretary-kirstjen-nielsen-to-face-questions-from-lawmakers/2018/12/20/f7d2ffea-0460-11e9-8186-4ec26a485713_story.html) (stating that “Mexican officials insisted the policy did not amount to an agreement, but was instead being imposed on them by the United States”).

<sup>58</sup> *Id.*

<sup>59</sup> U.S. Dep’t of Homeland Security Press Release, Migrant Protection Protocols (Jan. 24, 2019), at <https://www.dhs.gov/news/2019/01/24/migrant-protection-protocols> [<https://perma.cc/BX43-5P6B>].

United States was sent back to Mexico on January 29.<sup>60</sup> A legal challenge to the policy was filed on February 14, 2019, by immigrants and advocacy groups.<sup>61</sup> The complaint describes the dangers to migrants of remaining in Mexico, including the risks of experiencing gang violence, discrimination, and extortion, and notes that Mexico has “no functioning asylum system.”<sup>62</sup> The complaint alleges that the Migration Protection Protocols violate portions of the INA and the APA, and it also raises a claim under customary international law of a violation of the prohibition against *refoulement*.<sup>63</sup>

Leading up to and following the United States’ response to the arrival of large groups of migrants at the southern border, the Trump administration has continued to implement various other measures related to migration from Central America. With its move away from family separation practices, it is now seeking to abolish aspects of a long-standing consent decree, known as the *Flores* Settlement, which limits the detention of migrant children.<sup>64</sup> The aim of the Trump administration in doing so is that, rather than releasing families, Immigration and Customs Enforcement “may use appropriate facilities to detain family units together during their immigration proceedings . . . .”<sup>65</sup> In another development last year, Sessions adopted an interpretation of the INA’s asylum provisions that excluded asylum seekers from grounding their claims to belong to a protected “social group” in “private criminal activity,” thus effectively eliminating asylum for claims “pertaining to domestic violence or gang violence perpetrated by non-governmental actors.”<sup>66</sup> A federal district court granted a permanent injunction against Session’s decision in December 2018; the case is presently pending on appeal.<sup>67</sup> Finally, the last weeks of 2018 and first weeks of 2019 saw unprecedented gridlock over the issue of funding for a physical barrier at the border. After a 35-day partial government shutdown, Trump signed a short-term spending bill, which did not include funding for the border wall.<sup>68</sup> When it became clear that further funding

<sup>60</sup> Richard Gonzales, *Trump Administration Begins “Remain In Mexico” Policy, Sending Asylum-Seekers Back*, NPR (Jan. 29, 2019), at <https://www.npr.org/2019/01/29/689819928/trump-administration-begins-remain-in-mexico-policy-sending-asylum-seekers-back>.

<sup>61</sup> Complaint for Declaratory and Injunctive Relief, *Innovation Law Lab v. Nielsen*, No. 19-CV-00807 (N.D. Cal. Feb. 14, 2019), available at [https://www.splcenter.org/sites/default/files/2019.02.14.0001\\_compl.\\_for\\_decl.\\_and\\_inj.\\_relief.pdf](https://www.splcenter.org/sites/default/files/2019.02.14.0001_compl._for_decl._and_inj._relief.pdf).

<sup>62</sup> *Id.*, paras. 49–71.

<sup>63</sup> *Id.*, paras. 147–81; see also *id.*, para. 172 (observing that the “prohibition on *refoulement* is a specific, universal, and obligatory norm of customary international law”).

<sup>64</sup> The *Flores* Settlement is a 1997 consent decree that prescribes minimum standards for the treatment of minors in immigration custody. Stipulated Settlement Agreement, *Flores v. Reno*, No. CV 85-4544-RJK(Px) (C.D. Cal. Jan. 7, 1997), available at [https://www.aclu.org/sites/default/files/assets/flores\\_settlement\\_final\\_plus\\_extension\\_of\\_settlement011797.pdf](https://www.aclu.org/sites/default/files/assets/flores_settlement_final_plus_extension_of_settlement011797.pdf).

<sup>65</sup> Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children, 83 Fed. Reg. 45486 (proposed Sept. 7, 2018). Prior to this proposed rulemaking by the Department of Homeland Security, the Department of Justice had attempted unsuccessfully to use litigation to revoke aspects of the *Flores* Settlement. Order Denying Defendants’ “Ex Parte Application for Limited Relief from Settlement Agreement” at 7, *Flores v. Sessions*, No. CV 85-4544-DMG (AGRx) (C.D. Cal. July 9, 2018), available at <https://www.aila.org/File/Related/14111359ac.pdf>.

<sup>66</sup> *Matter of A-B-*, 27 I. & N. Dec. 316, 317, 320 (2018). This administrative adjudicatory decision reversed an Obama-era ruling on this issue. See *id.* at 317.

<sup>67</sup> *Grace v. Whitaker*, 344 F. Supp. 3d 96 (D.D.C. 2018).

<sup>68</sup> Jessica Taylor, *Trump Signs Short-Term Bill to End Government Shutdown, But Border Fight Still Looms*, NPR (Jan. 25, 2019), at <https://www.npr.org/2019/01/25/688414503/watch-live-trump-addresses-shutdown-from-white-house-rose-garden>.

would not be forthcoming at the level sought by Trump, he proclaimed on February 15, 2019, that “a national emergency exists at the southern border of the United States” in order to unlock other funding tied to emergency support for the military.<sup>69</sup> Legal challenges to Trump’s declaration of an emergency are pending in the courts.<sup>70</sup>

*American Law Institute Releases a Volume of the Restatement Fourth of the Foreign Relations Law of the United States, Partially Revising the Restatement Third*

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In late 2018, the American Law Institute released a volume of the Restatement Fourth of the Foreign Relations Law of the United States. Initiated in October 2012 under the direction of Coordinating Reporters Sarah Cleveland and Paul Stephan, this volume covers three areas of U.S. foreign relations law: treaties, jurisdiction, and sovereign immunity. It remains to be seen whether the American Law Institute will revisit other portions of the Restatement Third, which was published in 1987.<sup>1</sup> “[I]n the meantime, the provisions of the Third Restatement remain the position of The American Law Institute except where superseded by provisions in this Fourth Restatement.”<sup>2</sup>

The Restatement Fourth’s section on treaties was led by Reporters Curtis Bradley, Sarah Cleveland, and Edward Swaine. This section covers only treaties joined through the domestic legal process specified in the U.S. Constitution’s Treaty Clause and does not discuss other types of international agreements made by the United States.<sup>3</sup> There are several notable changes from the Restatement Third. Among them is that the comments to Section 306 on the interpretation of treaties acknowledge that Articles 31 and 32 of the Vienna Convention on the Law of Treaties are now regarded as reflective of customary international law, including by the United States.<sup>4</sup> Another change is that Section 310, although “generally consistent with the approach of the Restatement Third,” substantially updates the Restatement Third’s language regarding the

<sup>69</sup> Proclamation 9844, 84 Fed. Reg. 4949 (Feb. 15, 2019); see also Scott R. Anderson & Margaret Taylor, *What Authorities Is President Trump Using to Build a Border Wall*, LAWFARE (Feb. 15, 2019), at <https://www.lawfareblog.com/what-authorities-president-trump-using-build-border-wall> (discussing the legal nuances of this issue in detail).

<sup>70</sup> Damian Paletta, Mike DeBonis, John Wagner, Amy B. Wang & Missy Ryan, *Trump’s Declaration of National Emergency Hit with First Lawsuits*, WASH. POST (Feb. 16, 2019), at [https://www.washingtonpost.com/politics/2019/02/16/trumps-declaration-national-emergency-faces-political-legal-challenges/?noredirect=on&utm\\_term=.dae-c82a8a58a](https://www.washingtonpost.com/politics/2019/02/16/trumps-declaration-national-emergency-faces-political-legal-challenges/?noredirect=on&utm_term=.dae-c82a8a58a) (noting that within a day of this announcement one case had been filed challenging the decision on the merits, another case had been filed challenging transparency related to decision making, and still more challenges were in preparation).

<sup>1</sup> RESTATEMENT (FOURTH) OF FOREIGN RELATIONS: SELECTED TOPICS IN TREATIES, JURISDICTION, AND SOVEREIGN IMMUNITY, at xvii (2018) [hereinafter RESTATEMENT (FOURTH)] (Foreword by American Law Institute Director Richard Revesz).

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

<sup>3</sup> *Id.* at 7 (introductory note) (further observing that “[i]n U.S. domestic law . . . the term ‘treaties’ refers . . . to international agreements concluded by the President with the advice and consent of two-thirds of the Senate”).

<sup>4</sup> *Id.*, § 306, cmt. a & rep. note 13.

self-execution of treaties to account for the U.S. Supreme Court's decision in *Medellín v. Texas*<sup>5</sup> and other developments subsequent to the Restatement Third's publication.<sup>6</sup> A third difference is that, "[u]nlike in the prior two Restatements, [the Restatement Fourth] does not take a position on whether there is some sort of subject-matter limitation on the treaty power."<sup>7</sup>

The Restatement Fourth's section on jurisdiction was led by Reporters William Dodge, Anthea Roberts, and Paul Stephan. In contrast to the Restatement Third, the Restatement Fourth's section on jurisdiction generally places more emphasis on domestic law.<sup>8</sup> In an important specific difference, Section 407 of the Restatement Fourth does not retain the former Section 403's insistence that, under international law, exercises of prescriptive jurisdiction must be "reasonable" as determined by various factors.<sup>9</sup> Instead, the Restatement Fourth replaces the reasonableness requirement, which was "not supported by state practice," with the requirement that a "genuine connection" exist "between the subject of the regulation and the state seeking to regulate."<sup>10</sup> The Restatement Fourth nevertheless retains the bases for prescriptive jurisdiction provided for in Sections 402 and 404 of the Restatement Third.<sup>11</sup> Section 405 of the Restatement Fourth separately recognizes that, as a matter of "prescriptive comity," courts in the United States may apply a principle of reasonableness in interpreting federal statutes, although this principle does not entitle courts to decline to apply federal law.<sup>12</sup> The Restatement Fourth also includes a section on the presumption against extraterritoriality, which was included in the Restatement Second but not the Restatement Third.<sup>13</sup>

The Restatement Fourth's section on sovereign immunity was led by Reporters David Stewart and Ingrid Wuert. Among other notable changes, Section 456 of the Restatement Fourth substantially revises Section 455(1) of the Restatement Third concerning claims to property.<sup>14</sup> In particular, Section 456 omits the provision concerning the types of claims to which states as a general matter are not immune from jurisdiction under international law.<sup>15</sup> Instead, it discusses only the types of claims to property over which courts in the

<sup>5</sup> 552 U.S. 491 (2008).

<sup>6</sup> RESTATEMENT (FOURTH), *supra* note 1, § 310, rep. note 14.

<sup>7</sup> *Id.*, § 312, rep. note 8 (noting a tension between the Restatement Second and the Restatement Third with respect to whether, as a constitutional matter, a treaty must address "matters of international concern").

<sup>8</sup> See William S. Dodge, *Jurisdiction in the Fourth Restatement of Foreign Relations Law*, 18 Y.B. PRIV. INT'L L. 143, 145 (2016) ("[T]he Fourth Restatement contains greater coverage of U.S. domestic law than its predecessor, including domestic principles of statutory interpretation, the act of state doctrine and foreign state compulsion, rules of civil and criminal procedure, and rules concerning the recognition and enforcement of foreign judgments. Such internationally oriented rules of domestic law may be grouped together under the general heading of 'international comity,' which the Fourth Restatement defines as 'deference to foreign states that international law does not mandate.'").

<sup>9</sup> See RESTATEMENT (THIRD) OF FOREIGN RELATIONS, § 403(1) (1987) [hereinafter RESTATEMENT (THIRD)].

<sup>10</sup> RESTATEMENT (FOURTH), *supra* note 1, § 407, rep. note 6.

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

<sup>12</sup> *Id.*, § 405; *id.*, cmt. a ("Reasonableness is a principle of statutory interpretation and not a discretionary judicial authority to decline to apply federal law. It operates in conjunction with other principles of statutory interpretation. When the intent of Congress to apply a particular provision is clear, a court must apply that provision even if doing so would interfere with the sovereign authority of other states.").

<sup>13</sup> *Id.*, § 404, rep. note 13. The reporters' notes engage extensively with U.S. Supreme Court precedent that post-dates the Restatement Third. See *id.*, § 404, rep. notes 1–4, 6–11.

<sup>14</sup> *Id.*, § 456, rep. note 5.

<sup>15</sup> Compare RESTATEMENT (THIRD), *supra* note 9, § 455 with RESTATEMENT (FOURTH), *supra* note 1, § 456.

United States may exercise jurisdiction.<sup>16</sup> Additionally, the Restatement Fourth includes a new section providing that foreign states are not immune from suit in U.S. courts in actions to compel arbitration pursuant to an agreement to arbitrate, reflecting the adoption in 1988 of Section 1605(a)(6) of the Foreign Sovereign Immunities Act (FSIA).<sup>17</sup> The Restatement Fourth also includes a new section on claims against state sponsors of terrorism to account for various legislative enactments adopted through the period from 1996 to 2016.<sup>18</sup> These include Section 1605A of the FSIA, which provides for a terrorism exception to foreign states' immunity from jurisdiction, as well as the Justice Against Sponsors of Terrorism Act.<sup>19</sup>

#### INTERNATIONAL CRIMINAL LAW

##### *United States Seeks Extradition of Huawei Official Charged with Violating Sanctions Against Iran*

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On December 1, 2018, Canadian authorities arrested Meng Wanzhou, the chief financial officer of Chinese telecom manufacturer Huawei, in Vancouver as she was going from Hong Kong to Mexico. Meng, who has been charged by the U.S. Department of Justice with crimes relating to violations of U.S. sanctions on Iran, is currently awaiting an extradition hearing in Canada. Her arrest has complicated efforts to reach a resolution to the ongoing U.S.-China trade dispute while straining relations between China and Canada, which is seeking the release of several Canadians detained by China in apparent retaliation for Meng's arrest.

Meng was indicted under seal by a grand jury in the Eastern District of New York,<sup>1</sup> where a warrant for her arrest was issued on August 22, 2018.<sup>2</sup> When Meng's travel plans became known, the United States sought Canadian assistance, and she was arrested on December 1, 2018, as she was traveling through Vancouver International Airport.<sup>3</sup> Although U.S.

<sup>16</sup> RESTATEMENT (FOURTH), *supra* note 1, § 456.

<sup>17</sup> *Id.*, § 458, cmt. a.

<sup>18</sup> *Id.*, § 460, rep. note 12.

<sup>19</sup> *Id.*, § 460, rep. notes 1, 9.

<sup>1</sup> U.S. Dep't of Justice Press Release, Chinese Telecommunications Conglomerate Huawei and Huawei CFO Wanzhou Meng Charged with Financial Fraud (Jan. 28, 2019), at <https://www.justice.gov/opa/pr/chinese-telecommunications-conglomerate-huawei-and-huawei-cfo-wanzhou-meng-charged-financial> [<https://perma.cc/V8F7-Z65S>] [hereinafter DOJ Meng Indictment Press Release].

<sup>2</sup> Emily Rauhala, *Huawei Executive Wanted by U.S. Faces Fraud Charges Related to Iran Sanctions, Could Face 30 Years in Prison*, WASH. POST (Dec. 7, 2018), at [https://www.washingtonpost.com/world/the\\_americas/huawei-executive-wanted-by-us-scheduled-for-bail-hearing-in-canada/2018/12/07/0a08c602-fa31-11e8-863a-8972120646e0\\_story.html?utm\\_term=.7d50ad8abc8a](https://www.washingtonpost.com/world/the_americas/huawei-executive-wanted-by-us-scheduled-for-bail-hearing-in-canada/2018/12/07/0a08c602-fa31-11e8-863a-8972120646e0_story.html?utm_term=.7d50ad8abc8a).

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

officials did not initially disclose the precise nature of the charges against Meng, details of the allegations—including the fact that Meng potentially faces up to thirty years in prison—were revealed by an attorney for the Canadian Department of Justice during a hearing in which he asked the court to deny Meng bail as she fights extradition to the United States.<sup>4</sup>

On January 28, 2019, the U.S. Department of Justice partially unsealed the indictment against Meng.<sup>5</sup> Also named in the indictment were Huawei and several of its subsidiaries.<sup>6</sup> In a press conference announcing the charges, Acting U.S. Attorney General Matthew Whitaker was joined by Secretary of Homeland Security Kirstjen Nielsen, Commerce Secretary Wilbur Ross, and a number of other senior government officials. Secretary Nielsen stated:

As charged in the indictment, Huawei and its Chief Financial Officer broke U.S. law and have engaged in a fraudulent financial scheme that is detrimental to the security of the United States . . . . They willfully conducted millions of dollars in transactions that were in direct violation of the Iranian Transactions and Sanctions Regulations, and such behavior will not be tolerated. The Department of Homeland Security is focused on preventing nefarious actors from accessing or manipulating our financial system, and we will ensure that legitimate economic activity is not exploited by our adversaries . . . .<sup>7</sup>

Secretary Ross remarked:

For years, Chinese firms have broken our export laws and undermined sanctions, often using U.S. financial systems to facilitate their illegal activities . . . . This will end. The Trump Administration continues to be tougher on those who violate our export control laws than any administration in history . . . .<sup>8</sup>

The thirteen-count indictment charges Meng with committing, among other crimes, wire fraud and bank fraud in connection with misrepresentations that Huawei made beginning in or around July 2007 about its dealings with Iran.<sup>9</sup> Under the Iranian Transactions and Sanction Regulations (ITSR), originally promulgated in the late 1990s by the Department of the Treasury's Office of Foreign Assets Control, the export of goods, technology, and services from the United States or by a U.S. person to Iran or the Iranian government is prohibited.<sup>10</sup>

<sup>4</sup> Kate Conger, *Huawei Executive Took Part in Sanctions Fraud, Prosecutors Say*, N.Y. TIMES (Dec. 7, 2018), at <https://www.nytimes.com/2018/12/07/technology/huawei-meng-wanzhou-fraud.html>.

<sup>5</sup> DOJ Meng Indictment Press Release, *supra* note 1. See also David Sanger, Katie Benner & Matthew Goldstein, *Huawei and Top Executive Face Criminal Charges in the U.S.*, N.Y. TIMES (Jan. 28, 2019), at <https://www.nytimes.com/2019/01/28/us/politics/meng-wanzhou-huawei-iran.html?action=click&module=Top%20Stories&pgtype=Homepage>.

<sup>6</sup> DOJ Meng Indictment Press Release, *supra* note 1.

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

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

<sup>9</sup> Indictment, *United States v. Meng*, Criminal No. 18-457 (S-2) (AMD) (E.D.N.Y. Jan. 24, 2019), available at <https://www.justice.gov/usao-edny/press-release/file/1125036/download> [<https://perma.cc/WP6L-WLW4>] [hereinafter *Meng Indictment*].

<sup>10</sup> 31 C.F.R. § 560.204 (2018). This prohibition was set forth in Executive Order No. 13,059, 62 Fed. Reg. 44,531 (1997), which in turn was grounded in President Clinton's earlier declaration of a national emergency in Executive Order 12,957 pursuant to the International Emergency Economic Powers Act. The national emergency declared in Executive Order 12,957 was not affected by President Obama's Joint Comprehensive Plan of Action with Iran, from which President Trump subsequently withdrew the United States. U.S. DEP'T OF THE TREASURY &

The ITSR also prohibit the provision of U.S. dollar-clearing services to Iran or the Iranian government.<sup>11</sup> According to the indictment, Huawei operated a corporation called Skycom:

as an unofficial subsidiary to obtain otherwise prohibited U.S.-origin goods, technology and services, including banking services, for HUAWEI's Iran-based business while concealing the link to HUAWEI. HUAWEI could thus attempt to claim ignorance with respect to any illegal act committed by SKYCOM on behalf of HUAWEI, including violations of the ITSR and other applicable U.S. law.<sup>12</sup>

By making false representations about its business dealings in Iran, the indictment charges, Huawei caused various "victim financial institutions" to inadvertently process millions of dollars in transactions for Huawei's business activities in Iran in violation of U.S. sanctions law.<sup>13</sup> The indictment alleges that Meng played a direct role in these misrepresentations by, for example, providing a PowerPoint presentation to an executive of a U.S. financial institution that falsely claimed that Huawei complied with all applicable U.S., United Nations, and European Union sanctions on Iran and that its relationship with Skycom constituted "normal business cooperation."<sup>14</sup> Additionally, the indictment alleges that Skycom employed at least one U.S. citizen in Iran in violation of U.S. law, and that Huawei conspired to obstruct justice by relocating witnesses with knowledge of Huawei's operations in Iran to China and by spoliation of evidence.<sup>15</sup>

Meng is currently awaiting an extradition hearing and has been released on bail on the condition that she stay at one of her homes in Vancouver, travel only within a limited range, and abide by a curfew.<sup>16</sup> Although a spokesman for the Chinese Foreign Ministry urged the United States to "immediately withdraw the arrest warrant against Miss Meng Wanzhou and stop making such kinds of extradition requests,"<sup>17</sup> the Canadian Department of Justice confirmed that it received a formal extradition request from the United States on January 28, 2019.<sup>18</sup> On March 1, Canada's Department of Justice issued

U.S. DEP'T OF STATE, GUIDANCE RELATING TO THE LIFTING OF CERTAIN U.S. SANCTIONS PURSUANT TO THE JOINT COMPREHENSIVE PLAN OF ACTION ON IMPLEMENTATION DAY 41 (Jan. 16, 2016), available at [https://www.treasury.gov/resource-center/sanctions/Programs/Documents/Implement\\_guide\\_jcpoa.pdf](https://www.treasury.gov/resource-center/sanctions/Programs/Documents/Implement_guide_jcpoa.pdf) [<https://perma.cc/UUB8-LJ8Q>] (noting that "the Termination E.O. does not affect: (i) the national emergency declared in E.O. 12957, which shall remain in place, (ii) any E.O. issued in furtherance of that national emergency . . ."); see also Kristina Daugirdas & Julian Davis Mortenson, *Contemporary Practice of the United States*, 110 AJIL 347, 351 & n. 41 (2016).

<sup>11</sup> 31 C.F.R. § 560.427 (2018).

<sup>12</sup> Meng Indictment, *supra* note 9, para. 11.

<sup>13</sup> *Id.*, paras. 12, 15.

<sup>14</sup> *Id.*, para. 19.

<sup>15</sup> *Id.*, paras. 11, 26.

<sup>16</sup> Emily Rauhala, *Trump Says He Would Intervene if Needed in Justice Dept. Case Against Chinese Telecom Executive Accused of Violating Iran Sanctions*, WASH. POST (Dec. 11, 2018), at [https://www.washingtonpost.com/world/former-canadian-diplomat-reported-missing-in-china-following-arrest-of-huawei-executive/2018/12/11/350c6bb8-fcdb-11e8-a17e-162b712e8fc2\\_story.html?utm\\_term=.c4637d6c151a](https://www.washingtonpost.com/world/former-canadian-diplomat-reported-missing-in-china-following-arrest-of-huawei-executive/2018/12/11/350c6bb8-fcdb-11e8-a17e-162b712e8fc2_story.html?utm_term=.c4637d6c151a).

<sup>17</sup> Associated Press, *The Latest: Huawei Exec Changes Bail Benefactor in Canada*, USNEWS.COM (Jan. 29, 2019), at <https://www.usnews.com/news/world/articles/2019-01-29/the-latest-china-urges-end-to-us-crackdown-on-huawei>.

<sup>18</sup> Jesse Ferreras, *U.S. Sends Meng Wanzhou Extradition Request to Canada—But There Are Several Steps Left*, GLOB. NEWS (Jan. 28, 2019), at <https://globalnews.ca/news/4900085/meng-wanzhou-extradition-request>.

an “Authority to Proceed” for the extradition,<sup>19</sup> and the extradition hearing is presently scheduled for May.<sup>20</sup>

According to the terms of the U.S-Canada Extradition Treaty, which entered into force in 1976, both nations:

agree[] to extradite to the other, in the circumstances and subject to the conditions described in this Treaty, persons found in its territory who have been charged with, or convicted of, any of the offenses covered by Article 2 of this Treaty committed within the territory of the other, or outside thereof under the conditions specified in Article 3(3) of this Treaty.<sup>21</sup>

Article 2 in turn incorporates a schedule annexed to the Treaty, which includes “[f]raud by a banker, agent, or by a director or officer of any company” among the listed offenses.<sup>22</sup> Article 8 provides that the decision whether to grant extradition shall be made according to the laws of the state to which the request for extradition is made.<sup>23</sup> Under Canadian law, if the courts determine that Meng can be extradited, the Canadian Minister of Justice may make a final determination whether to allow the extradition.<sup>24</sup> The entire process could span months or even years, as an adverse ruling may be appealed to the higher courts.<sup>25</sup>

On the same day the indictment against Meng and Huawei was partially unsealed, a separate ten-count indictment against Huawei was also unsealed in the Western District of Washington.<sup>26</sup> Initially returned by a grand jury on January 16, 2019, the indictment charges Huawei and its U.S. affiliate with conspiracy to steal trade secrets, attempted theft of trade secrets, wire fraud, and obstruction of justice.<sup>27</sup> Huawei allegedly stole technology related to the “Tappy” robotic phone system developed by T-Mobile to test new phones before they are released into the product market.<sup>28</sup> The indictment also alleges that Huawei instituted a

<sup>19</sup> Canadian Dep’t of Justice Press Release, Extradition Relevant to the Case of Ms. Meng Wanzhou (Mar. 1, 2019), at <https://www.canada.ca/en/departement-justice/news/2019/03/extradition-relevant-to-the-case-of-ms-meng-wanzhou.html>.

<sup>20</sup> Emily Rauhala, *Next Hearing in Huawei Executive’s Extradition Case Set for May 8*, WASH. POST (Mar. 6, 2019), at [https://www.washingtonpost.com/world/asia\\_pacific/canada-to-hold-first-hearing-in-huawei-extradition-case/2019/03/06/ab5a0eee-3f7d-11e9-85ad-779ef05fd9d8\\_story.html?utm\\_term=.e8d6178c1855](https://www.washingtonpost.com/world/asia_pacific/canada-to-hold-first-hearing-in-huawei-extradition-case/2019/03/06/ab5a0eee-3f7d-11e9-85ad-779ef05fd9d8_story.html?utm_term=.e8d6178c1855) (also noting that Meng has filed a civil suit against various Canadian government entities and officials in relation to her detention).

<sup>21</sup> Treaty on Extradition Between the United States of America and Canada, U.S.-Can., Art. 1, Dec. 3, 1971, 27 UST 983.

<sup>22</sup> *Id.* Art. 2 & Schedule.

<sup>23</sup> *Id.* Art. 8.

<sup>24</sup> Extradition Act, SC 1999, c 18 (Can.).

<sup>25</sup> Edward Wong, Katie Benner & Alan Rappeport, *U.S. Will Ask Canada to Extradite Huawei Executive*, N.Y. TIMES (Jan. 22, 2019), at <https://www.nytimes.com/2019/01/22/us/politics/meng-wanzhou-extradition.html>; Extradition Act, *supra* note 24.

<sup>26</sup> U.S. Dep’t of Justice Press Release, Chinese Telecommunications Device Manufacturer and Its U.S. Affiliate Indicted for Theft of Trade Secrets, Wire Fraud, and Obstruction of Justice (Jan. 28, 2019), at <https://www.justice.gov/opa/pr/chinese-telecommunications-device-manufacturer-and-its-us-affiliate-indicted-theft-trade> [<https://perma.cc/C84Z-KK4W>] [hereinafter DOJ Huawei Indictment Press Release].

<sup>27</sup> *Id.*

<sup>28</sup> Indictment at paras. 3, 27–36, United States v. Huawei, Criminal No. CR19-010-RSM (W.D. Wash. Jan. 16, 2019), available at <https://www.justice.gov/opa/press-release/file/1124996/download> [<https://perma.cc/27X7-3BYD>] [hereinafter Huawei Indictment].

formal “bonus program” to encourage its employees to steal information from competing firms.<sup>29</sup> Globally, American officials are pressuring U.S. allies to ban Huawei, the largest manufacturer of telecommunications equipment in the world,<sup>30</sup> from their national infrastructure systems as part of what they view as a broader, technological arms race between the United States and China.<sup>31</sup>

Meng’s arrest comes at a delicate moment in U.S.-China trade relations.<sup>32</sup> In an apparent coincidence, Meng was arrested on the same day that Trump and Chinese President Xi Jinping were discussing trade over dinner on the sidelines of the G-20 Summit in Buenos Aires, Argentina.<sup>33</sup> Outwardly, American and Chinese officials have downplayed any connection between the two issues.<sup>34</sup> Responding to a question about the potential impact of Meng’s arrest on the ongoing trade negotiations, a spokesman for the Chinese Foreign Ministry stated that “China and the US should follow the consensus reached by the two heads of state to step up consultations and reach a mutually beneficial agreement at an early date.”<sup>35</sup> Similarly, Robert Lighthizer, the U.S. Trade Representative, emphasized that “[t]his is a criminal justice matter. It is totally separate from anything that I work on or anything that the trade policy people in the administration work on.”<sup>36</sup> Canadian Foreign Minister Chrystia Freeland also portrayed Meng’s arrest as a purely law enforcement matter:

[C]anada and the United States are countries with deeply shared democratic values. Those democratic values include the fact that in both countries, we have a deep regard for the rule of law and strong and independent judiciaries. I think that’s one of the reasons that Canada and the United States, and both Canadians and Americans, feel comfortable with the existence of an extradition treaty between our two countries. And having said all of that, Canada is clearly of the view that extradition—the extradition process—is a criminal justice process. This is not a tool that should be used for politicized ends.<sup>37</sup>

Trump, however, has not drawn as clear-cut a separation between criminal justice enforcement and trade negotiations. In an interview with Reuters, he suggested that he might be willing to intervene in Meng’s case, stating, “Whatever’s good for this country, I would do. If I think it’s good for

<sup>29</sup> *Id.*, para. 47.

<sup>30</sup> Meng Indictment, *supra* note 9, para. 1.

<sup>31</sup> David E. Sanger, Julian E. Barnes, Raymond Zhong & Marc Santora, *In 5G Race with China, U.S. Pushes Allies to Fight Huawei*, N.Y. TIMES (Jan. 26, 2019), at <https://www.nytimes.com/2019/01/26/us/politics/huawei-china-us-5g-technology.html>.

<sup>32</sup> For discussion of the ongoing trade dispute between the United States and China, see Jean Galbraith, *Contemporary Practice of the United States*, 112 AJIL 751 (2018).

<sup>33</sup> Mark Landler, Edward Wong & Katie Benner, *Huawei Executive’s Arrest Intensifies Trade War Fears*, N.Y. TIMES (Dec. 6, 2018), at <https://www.nytimes.com/2018/12/06/us/politics/huawei-meng-china-iran.html> (stating that during this dinner neither leader was aware of the arrest).

<sup>34</sup> See Wong, Benner & Rappeport, *supra* note 25 (“American and Chinese officials have tried to portray the arrest of Ms. Meng as separate from the trade talks.”).

<sup>35</sup> Chinese Foreign Ministry Press Release, Foreign Ministry Spokesperson Geng Shuang’s Regular Press Conference on December 6, 2018 (Dec. 6, 2018), at <https://www.mfa.gov.cn/ce/cegv/eng/fyrth/t1619623.htm>.

<sup>36</sup> Keith Bradsher & Raymond Zhong, *China Tries to Balance Anger Over Huawei Arrest with Warmer Trade Ties*, N.Y. TIMES (Dec. 9, 2018), at <https://www.nytimes.com/2018/12/09/technology/canada-china-huawei-meng-wanzhou.html>.

<sup>37</sup> U.S. Dep’t of State Press Release, Press Availability at the U.S.-Canada 2+2 Ministerial (Dec. 14, 2018), at <https://www.state.gov/secretary/remarks/2018/12/288109.htm> [<https://perma.cc/3WFE-8WF7>].

what will be certainly the largest trade deal ever made—which is a very important thing—what’s good for national security—I would certainly intervene if I thought it was necessary.”<sup>38</sup>

In contrast to the outwardly conciliatory tone adopted by American and Chinese officials, a piece in China’s state-run *People’s Daily* warned Canada of a “heavy price” for its detention of Meng.<sup>39</sup> Tensions between Canada and China escalated when, several days after Meng’s arrest, the Chinese Ministry of State Security detained two Canadian citizens on “suspicion of engaging in activities that endanger national security.”<sup>40</sup> Both Michael Spavor, a writer and entrepreneur who operates cultural exchange tours to North Korea, and Michael Kovrig, a former Canadian diplomat and senior adviser at the International Crisis Group,<sup>41</sup> are reportedly under investigation for breaching a Chinese law regarding unregistered nongovernmental organizations<sup>42</sup> and were further accused in March of the theft of state secrets.<sup>43</sup> Separately, another Canadian citizen, Robert Lloyd Schellenberg, was sentenced to death by a Chinese court on January 14, 2019, during a retrial on charges that he participated in a drug smuggling ring.<sup>44</sup> In response, Canadian Prime Minister Justin Trudeau stated, “It is of extreme concern to us as a government—as it should be to all our international friends and allies—that China has chosen to begin to arbitrarily apply a death penalty.”<sup>45</sup>

<sup>38</sup> Jeff Mason & Steve Holland, *Exclusive: Trump Says He Could Intervene in U.S. Case Against Huawei CFO*, REUTERS (Dec. 11, 2018), at <https://www.reuters.com/article/us-usa-trump-huawei-tech-exclusive/exclusive-trump-says-he-could-intervene-in-u-s-case-against-huawei-cfo-idUSKBN10A2PQ>.

<sup>39</sup> Curtis Stone, *China to Canada: Trampling on the Rights of Chinese Citizens Comes with a High Cost*, PEOPLE’S DAILY ONLINE (Dec. 10, 2018), at <http://en.people.cn/n3/2018/1210/c90000-9526941.html>.

<sup>40</sup> Anna Fifield & Amanda Coletta, *Second Canadian Detained in China Amid Row Over Huawei Extradition*, WASH. POST (Dec. 13, 2018), at [https://www.washingtonpost.com/world/asia\\_pacific/beijing-suggests-think-tank-that-employed-analyst-they-arrested-is-operating-illegally-in-china/2018/12/12/74847c42-fdec-11e8-ba87-8c7facdf6739\\_story.html?utm\\_term=.0ed927f09168](https://www.washingtonpost.com/world/asia_pacific/beijing-suggests-think-tank-that-employed-analyst-they-arrested-is-operating-illegally-in-china/2018/12/12/74847c42-fdec-11e8-ba87-8c7facdf6739_story.html?utm_term=.0ed927f09168).

<sup>41</sup> Austin Ramzy, *Clashes Over Trade and Detentions: What China, the U.S. and Canada Are Fighting Over*, N.Y. TIMES (Dec. 13, 2018), at <https://www.nytimes.com/2018/12/13/world/asia/china-united-states-trade-detentions.html>.

<sup>42</sup> *Id.*; Fifield & Coletta, *supra* note 40.

<sup>43</sup> Anna Fifield, *China Accuses Two Detained Canadians of Stealing State Secrets*, WASH. POST (Mar. 4, 2019), at [https://www.washingtonpost.com/world/asia\\_pacific/china-accuses-two-detained-canadians-of-stealing-and-selling-state-secrets/2019/03/04/766f2796-3e7e-11e9-a44b-42f4df262a4c\\_story.html?utm\\_term=.e9999b488c6b](https://www.washingtonpost.com/world/asia_pacific/china-accuses-two-detained-canadians-of-stealing-and-selling-state-secrets/2019/03/04/766f2796-3e7e-11e9-a44b-42f4df262a4c_story.html?utm_term=.e9999b488c6b) (noting that this “serious allegation . . . comes just days after Canada said it would proceed with the extradition case” against Meng).

<sup>44</sup> Gerry Shih & Emily Rauhala, *Trudeau Expresses “Extreme Concern” After Canadian Sentenced to Death on Drug Charges in China*, WASH. POST (Jan. 14, 2019), at [https://www.washingtonpost.com/world/asia\\_pacific/china-sentences-canadian-man-to-death-in-drug-case-linked-to-huawei-row/2019/01/14/058306a0-17fb-11e9-a804-c35766b9f234\\_story.html?utm\\_term=.bfb775a16331](https://www.washingtonpost.com/world/asia_pacific/china-sentences-canadian-man-to-death-in-drug-case-linked-to-huawei-row/2019/01/14/058306a0-17fb-11e9-a804-c35766b9f234_story.html?utm_term=.bfb775a16331).

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

## USE OF FORCE, ARMS CONTROL, AND NONPROLIFERATION

*President Trump Announces U.S. Troop Withdrawal from Syria*

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Begun over seven years ago, the conflict in Syria became and remains a humanitarian crisis.<sup>1</sup> The United States entered the conflict in 2014 and has since been involved through its use of airstrikes and deployment of ground forces. On December 19, 2018, President Trump announced his decision to withdraw U.S. troops from Syria.<sup>2</sup> In the months subsequent to this announcement, unsettled questions have lingered regarding a timeline for withdrawal, the fate of the U.S.-backed Kurdish forces in Syria, and how the decision to withdraw will affect U.S. interactions with other Middle Eastern countries.

The United States first entered the conflict in Syria in 2014 when President Obama began ordering airstrikes, joined by Qatar, Bahrain, Jordan, Saudi Arabia, and the United Arab Emirates, against the terrorist organization known as the Islamic State of Iraq and the Levant (ISIL).<sup>3</sup> The Obama administration claimed that it had domestic legal authority to conduct airstrikes against ISIL based on the 2001 and 2002 Authorizations for Use of Military Force,<sup>4</sup> and it claimed that, under international law, the U.S. use of force fell within its rights to individual and collective self-defense against threats posed by ISIL to itself and Iraq.<sup>5</sup> In 2015, Obama authorized the first ground forces to enter the Syrian

<sup>1</sup> U.S. Dep't of State Press Release, Briefing on Syria (Nov. 14, 2018), at <https://www.state.gov/r/pa/prs/ps/2018/11/287368.htm> [<https://perma.cc/CV2N-2HMJ>] [hereinafter November Briefing] (noting that the conflict has led to an estimated 400,000 deaths, 200,000 incarcerations, 100,000 disappearances, and thousands tortured). For information about the Syrian refugee crisis, see UNHCR, Syria Emergency, at <https://www.unhcr.org/syria-emergency.html>.

<sup>2</sup> Donald J. Trump (@realDonaldTrump), TWITTER (Dec. 19, 2018, 3:10 PM), at <https://twitter.com/realDonaldTrump/status/1075528854402256896> [<https://perma.cc/Q6GG-9WRA>] [hereinafter Trump Video Announcement].

<sup>3</sup> White House Press Release, Transcript of Background Conference Call on Airstrikes in Syria (Sept. 23, 2014), at <https://obamawhitehouse.archives.gov/the-press-office/2014/09/23/background-conference-call-airstrikes-syria> [<https://perma.cc/V2NV-6CNR>]. For more details, see Kristina Daugirdas & Julian Davis Mortenson, Contemporary Practice of the United States, 109 AJIL 174, 199 (2015).

<sup>4</sup> White House Press Release, Letter from the President – War Powers Resolution Regarding Iraq (Sept. 23, 2014), at <https://obamawhitehouse.archives.gov/the-press-office/2014/09/23/letter-president-war-powers-resolution-regarding-iraq> [<https://perma.cc/V8HE-6X59>]. The 2001 AUMF authorizes the president “to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States . . . .” Authorization for Use of Military Force (AUMF), Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (2001) (codified at 50 U.S.C. § 1541 (2012)). The 2002 AUMF provides that the “President is authorized to use the Armed Forces of the United States as he determines to be necessary and appropriate in order to (1) defend the national security of the United States against the continuing threat posed by Iraq; and (2) enforce all relevant United Nations Security Council resolutions regarding Iraq.” Pub. L. No. 107-243, § 3(a), 116 Stat. 1498 (2002) (codified at 50 U.S. § 1541 (2012)). For discussion of the legal reasoning undergirding the reliance on these two AUMFs, see Daugirdas & Mortenson, *supra* note 3, at 207–08 (further noting that reliance on the 2002 AUMF was limited to airstrikes against ISIL in Iraq rather than Syria).

<sup>5</sup> The United States claimed that it had the right to conduct airstrikes in Syria based on Article 51 of the UN Charter because “the government of the State where the threat is located is unwilling or unable to prevent the use of its territory for such attacks.” Letter from Samantha Power, U.S. Ambassador to the United Nations, to Ban Ki-moon, Secretary-General of the United Nations, UN Doc. S/2014/695 (Sept. 23, 2014) [<https://perma.cc/HPS9-S6AW>]. *But see* Daugirdas & Mortenson, *supra* note 3, at 204–06 (noting that this “unable or unwilling” analysis

conflict.<sup>6</sup> Under this authorization, American Special Operation troops came to Syria in 2016, joining the Syrian Democratic Forces, a Kurdish-led militia, in the fight against ISIL.<sup>7</sup> Trump indicated on his first day in office in January 2017 a continued resolve to defeat ISIL, stating, “[w]e have to get rid of [ISIL]. Have to get rid of [ISIL]. We have no choice.”<sup>8</sup>

Over the course of 2017 and 2018, ISIL’s territory shrunk dramatically, continuing a trend since its territorial peak in 2014 when ISIL controlled approximately 100,000 square kilometers of territory in Syria and Iraq.<sup>9</sup> By December 2018, ISIL remained in possession of only about one percent of this territory.<sup>10</sup> Although Trump occasionally indicated during 2018 that ISIL had been fully defeated,<sup>11</sup> other government officials insisted that the Trump administration continued to fight ISIL in Syria. In April of that year, the White House press secretary stated that the “United States and our partners remain committed to eliminating the small [ISIL] presence in Syria that our forces have not already eradicated.”<sup>12</sup> Several months later, the Acting Assistant Secretary of State for the Bureau of Near Eastern Affairs, David Satterfield, emphasized that “[t]here should be no doubt as to the position of the President with respect to the broader issue of the U.S. enduring presence in Syria.”<sup>13</sup> When asked in early December if American soldiers would remain in Syria for “some time unforeseen,” Special Presidential Envoy for the Global Coalition to Defeat [ISIL] Brett McGurk responded that “it’s fair to say Americans will remain on the ground after the

is “relatively controversial”). In November 2015, the Security Council passed Resolution 2249, which “[c]alls upon Member States . . . to take all necessary measures . . . on the territory under the control of ISIL also known as Da’esh, in Syria and Iraq, to redouble and coordinate their efforts to prevent and suppress terrorist acts committed specifically by ISIL . . . .” SC Res. 2249, para. 5 (Nov. 20, 2015). This ambiguous language may be taken to provide additional international legal support for uses of force against ISIL. See Dapo Akande & Marko Milanović, *The Constructive Ambiguity of the Security Council’s ISIS Resolution*, EJIL: TALK! (Nov. 21, 2015), at <https://www.ejiltalk.org/the-constructive-ambiguity-of-the-security-councils-isis-resolution>. For airstrikes in Iraq, the United States claims an international legal justification separate from self-defense, namely the consent of the government of Iraq. See Daugirdas & Mortenson, *supra* note 3, at 206.

<sup>6</sup> President Barack Obama White House Press Release, Daily Press Briefing by the Press Secretary Josh Earnest 10/30/15 (Oct. 30, 2015), at <https://obamawhitehouse.archives.gov/the-press-office/2015/10/30/daily-press-briefing-press-secretary-josh-earnest-103015> [<https://perma.cc/J37Y-5W84>].

<sup>7</sup> Rod Nordland, *U.S. Exit Seen as a Betrayal of the Kurds, and a Boon for ISIS*, N.Y. TIMES (Dec. 19, 2018), at <https://nyti.ms/2Gwys3S>.

<sup>8</sup> Donald J. Trump, Remarks at the Central Intelligence Agency in Langley, Virginia, 2017 DAILY COMP. PRES. DOC. NO. 61, at 2 (Jan. 21).

<sup>9</sup> U.S. Dep’t of State Press Release, Department Press Briefing – December 11, 2018 (Dec. 11, 2018), at <https://www.state.gov/r/pa/prs/dpb/2018/12/288024.htm> [<https://perma.cc/KFT3-R47P>] [hereinafter December Briefing].

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

<sup>11</sup> In April 2018, Trump stated at a conference that he wanted “to bring our troops back home” and that it was “time” in light of the “success[] against [ISIL].” The President’s News Conference with President Kersti Kaljulaid of Estonia, President Raimonds Vejonis of Latvia, and President Dalia Grybauskaitė of Lithuania, 2018 DAILY COMP. PRES. DOC. NO. 212, at 6 (Apr. 3). Additionally, in November 2018, Trump claimed in an interview leading up to U.S. midterm elections that “[w]e’ve defeated [ISIL]. [ISIL] is defeated in all of the areas that we fought [ISIL] . . . .” John Hudson, *Lawmakers Raise Alarm About ISIS Attacks Against Syria’s Druze Population*, WASH. POST. (Nov. 8, 2018), at [https://www.washingtonpost.com/world/national-security/lawmakers-raise-alarm-about-isis-attacks-against-syrias-druze-population/2018/11/07/333c5872-b360-495a-92af-f5ef6ef50a73\\_story.html](https://www.washingtonpost.com/world/national-security/lawmakers-raise-alarm-about-isis-attacks-against-syrias-druze-population/2018/11/07/333c5872-b360-495a-92af-f5ef6ef50a73_story.html).

<sup>12</sup> White House Press Release, Statement by the Press Secretary on Syria (Apr. 4, 2018), at <https://www.whitehouse.gov/briefings-statements/statement-press-secretary-syria> [<https://perma.cc/P46S-KBHF>].

<sup>13</sup> U.S. Dep’t of State Press Release, Briefing on the Status of Syria Stabilization Assistance and Ongoing Efforts to Achieve an Enduring Defeat of ISIS (Aug. 17, 2018), at <https://www.state.gov/r/pa/prs/ps/2018/08/285202.htm> [<https://perma.cc/GLN9-KZBU>].

physical defeat of the caliphate, until we have the pieces in place to ensure that that defeat is enduring.”<sup>14</sup>

With the diminishment of ISIL’s territorial reach, government officials began discussing additional U.S. objectives for Syria. Secretary of State Mike Pompeo remarked in October 2018:

[ISIL], though not completely snuffed out, has been beaten into a shadow of its former self. And these changing circumstances have required the reassessment of America’s mission in Syria. Defeating [ISIL], which was once our primary focus, continues to be a top priority, but it will now be joined by two other mutually reinforcing objectives. These include a peaceful and political resolution to the Syrian conflict and the removal of all Iranian and Iranian-backed forces from Syria.<sup>15</sup>

On November 30, the White House released a statement supporting a bill called the Caesar Syria Civilian Protection Act of 2018 (CSCPA).<sup>16</sup> The CSCPA would have required sanctions on persons the president determines are knowingly engaged in providing financial, material, or technological support to the Syrian government and its officials and it would have barred such persons from entering the United States.<sup>17</sup> The CSCPA also described a strategy for deterring “foreign persons from entering into contracts related to reconstruction” in the areas that the president determined were under the control of the Syrian, Russian, and Iranian governments.<sup>18</sup> Although this bill passed the House, it did not receive a floor vote in the Senate before the expiration of the congressional session.<sup>19</sup> But another bill directed broadly at the conflict in Syria had more success. On December 11, 2018, Trump signed into law the Iraq and Syria Genocide Relief and Accountability Act of 2018 (ISGRAA), which “authorizes assistance to entities engaged in aiding individuals and communities in Iraq or Syria who are being, or are likely to be, targeted for genocide, crimes against humanity, or war crimes.”<sup>20</sup>

<sup>14</sup> December Briefing, *supra* note 9. Special Representative for Syria, Ambassador Jim Jeffrey, had previously remarked that “the enduring defeat means not simply smashing the last of [ISIL’s] conventional military units holding terrain, but ensuring that [ISIL] doesn’t immediately come back and sleeper cells come back as an insurgent movement.” November Briefing, *supra* note 1.

<sup>15</sup> U.S. Dep’t of State Press Release, Remarks at the 36th Annual Jewish Institute for National Security of America Awards Dinner (Oct. 10, 2018), at <https://www.state.gov/secretary/remarks/2018/10/286559.htm> [<https://perma.cc/K6EG-3TEQ>]. Ambassador Jeffrey also listed the same three U.S. objectives for Syria in a later briefing. November Briefing, *supra* note 1.

<sup>16</sup> White House Press Release, Statement of Support: H.R. 1677 – Caesar Syria Civilian Protection Act of 2018 (Nov. 30, 2018), at <https://www.whitehouse.gov/briefings-statements/statement-support-h-r-1677-caesar-syria-civilian-protection-act-2018> [<https://perma.cc/7QRN-D7Q4>]. The bill was named for a Syrian photographer with the pseudonym of Caesar who provided photographs of atrocities committed by the Assad regime. U.S. House of Representatives Comm. on Foreign Affairs Press Release, Engel Welcomes Senate Action on Syria Sanctions Bill (Sept. 26, 2018), at <https://foreignaffairs.house.gov/2018/9/engel-welcomes-senate-action-on-syria-sanctions-bill> [<https://perma.cc/FN4M-23EU>].

<sup>17</sup> H.R. 1677, 115th Cong. § 102 (2018). The text as reported to the Senate is available here: <https://perma.cc/PY38-GVD7>.

<sup>18</sup> *Id.*, § 103.

<sup>19</sup> *All Actions H.R.1677 — 115th Congress (2017–2018)*, CONGRESS.GOV, at <https://www.congress.gov/bill/115th-congress/house-bill/1677/all-actions?overview=closed#tabs> [<https://perma.cc/P9UL-T6MA>].

<sup>20</sup> Iraq and Syria Genocide Relief and Accountability Act, Pub. L. No. 115-300 (2018) [hereinafter ISGRAA]; White House Press Release, President Donald J. Trump Signed H.R. 390 into Law (Dec. 11, 2018), at <https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-signed-h-r-390-law> [<https://perma.cc/KJJ4-BJUF>].

Some of the assistance the ISGRAA authorizes includes permitting the secretary of state and the administrator of the United States Agency for International Development to conduct criminal investigations, provide infrastructure to effectively adjudicate cases, and collect and preserve evidence “for use in prosecutions in domestic courts, hybrid courts, and internationalized domestic courts . . . .”<sup>21</sup> This legislation signals a congressional interest in Syria that goes beyond a narrow focus on defeating ISIL.

In an apparently abrupt decision, Trump informed senior officials on December 18, 2018, of his decision to withdraw U.S. forces from the country.<sup>22</sup> Trump made his decision public when he tweeted the next morning that “[w]e have defeated [ISIL] in Syria, my only reason for being there during the Trump Presidency.”<sup>23</sup> Trump elaborated later that day in a tweeted video:

I’ve been President for almost two years and we’ve really stepped it up. And we have won against [ISIL]. We’ve beaten them and we’ve beaten them badly. We’ve taken back the land. And now it’s time for our troops to come back home. . . . It’s time to come back. They’re getting ready. You’re going to see them soon. These are great American heroes. . . . So our boys, our young women, our men—they’re all coming back and they’re coming back now.<sup>24</sup>

Congressional leaders and government officials were quick to criticize Trump’s decision. One day after Trump’s public announcement, two of his officials sent letters of resignation. McGurk announced that he would resign, explaining that “[t]he recent decision by the president came as a shock and was a complete reversal of policy that was articulated to us,” leaving “coalition partners confused and our fighting partners bewildered.”<sup>25</sup> Secretary of Defense Jim Mattis also announced his resignation, stating that like Trump, he has “said from the beginning that the armed forces of the United States should not be the policeman of the world,” but that his “views on treating allies with respect and also being clear-eyed about both malign actors and strategic competitors are strongly held . . . .”<sup>26</sup> Mattis explained that “[Trump] ha[s] the right to have a Secretary of Defense whose views are better aligned

<sup>21</sup> ISGRAA, *supra* note 20, § 5(a).

<sup>22</sup> Julian Borger & Martin Chulov, *Trump Shocks Allies and Advisers with Plan to Pull U.S. Troops Out of Syria*, *GUARDIAN* (Dec. 19, 2018), at <https://www.theguardian.com/us-news/2018/dec/19/us-troops-syria-withdrawal-trump>. Just days before, Trump had noted to congressional leadership that as “part of a comprehensive strategy to defeat [ISIL], United States Armed Forces are conducting a systematic campaign of airstrikes and other necessary operations against [ISIL] forces in Iraq and Syria.” White House Press Release, Text of a Letter from the President to the Speaker of the House of Representatives and the President Pro Tempore of the Senate (Dec. 7, 2018), at <https://www.whitehouse.gov/briefings-statements/text-letter-president-speaker-house-representatives-president-pro-tempore-senate-5> [<https://perma.cc/YQ4T-2P8R>] [hereinafter Letter to Congress] (sending letter to Congress pursuant to Trump’s War Powers Resolution duty, 50 U.S.C. § 1543(c), to keep Congress informed about deployments of U.S. forces equipped for combat).

<sup>23</sup> Donald J. Trump (@realDonaldTrump), *TWITTER* (Dec. 19, 2018, 6:29 AM), at <https://twitter.com/realDonaldTrump/status/1075397797929775105> [<https://perma.cc/JT3S-GN3L>].

<sup>24</sup> Trump Video Announcement, *supra* note 2.

<sup>25</sup> Rukmini Callimachi & Eric Schmitt, *Splitting with Trump Over Syria, American Leading ISIS Fight Steps Down*, *N.Y. TIMES* (Dec. 22, 2018), at <https://nyti.ms/2RcP5pk>. He further stated that he “ultimately concluded that [he] could not carry out these new instructions and maintain [his] integrity.” *Id.*

<sup>26</sup> Daniel Bush, *Read James Mattis’ Full Resignation Letter*, *PBS* (Dec. 20, 2018), at <https://www.pbs.org/news-hour/politics/read-james-mattis-full-resignation-letter>. The letter is permanently available here: <https://perma.cc/974Q-W78E>.

with [Trump's] on these and other subjects . . . ."<sup>27</sup> U.S. Senator Lindsey Graham along with five other senators signed a letter to Trump calling the decision to withdraw at this time "premature" and a "costly mistake."<sup>28</sup> The letter also expressed concern about the Kurdish forces that the United States would leave behind.<sup>29</sup> In a further signal of congressional concern, in early February the U.S. Senate passed a Middle East policy bill by a 77–23 vote that included a section warning against a "precipitous withdrawal" of U.S. forces in Syria and Afghanistan and expressing the Senate's "sense" that there is a "continuing threat to the homeland and our allies posed by al Qaeda and [ISIL], which maintain an ability to operate in Syria and Afghanistan."<sup>30</sup>

Analysts expressed concern about how the U.S. troop withdrawal would leave Kurdish forces vulnerable to attacks by Turkey.<sup>31</sup> Turkey's government has viewed the Syrian Democratic Forces as a threat due to their connections with a Turkish Kurdish separatist group, the PKK.<sup>32</sup> Only a week before Trump's announcement, President Erdogan had suggested that Turkey would undertake a raid in northeastern Syria, where the Syrian Democratic Forces receive U.S. support.<sup>33</sup> The Syrian Democratic Forces released a statement responding to Trump's withdrawal, expressing that,

at a time, while we are having fierce battles against the terrorism in the last strongholds of [ISIL] and fighting it's [*sic*] sleeper cells that are trying to organize its ranks in the region, the White House's decision to withdraw from northern and eastern Syria will negatively affect the campaign against the terrorism, and it will provide a chance for terrorism and its supporters in the political and military fields to recover again and launch counter-terrorist campaign in the region.<sup>34</sup>

Others expressed approval of Trump's decision to withdraw. President Putin announced that he believed Trump's decision was "correct" and that "[w]ith regards to the victory over ISIL, on the whole I agree with the president of the United States."<sup>35</sup> Erdogan remarked that

<sup>27</sup> *Id.*

<sup>28</sup> Lindsey Graham (@LindseyGrahamSC), TWITTER (Dec. 19, 2018, 6:27 PM), at <https://twitter.com/LindseyGrahamSC/status/1075578496733364226> [<https://perma.cc/5NWL-SK97>].

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

<sup>30</sup> Strengthening America's Security in the Middle East Act of 2019, S.1, 116th Cong. § 408(a) (2019). Twenty-five Democrats voted for the bill while twenty-two voted against it, signaling that it may be possible for the bill to pass in the Democrat-controlled House. Marianne Levine, *Senate Passes Middle East Policy Bill that Rebukes Trump*, POLITICO (Feb. 5, 2019), at <https://www.politico.com/story/2019/02/05/senate-passes-middle-east-policy-bill-1147816>. Trump recently announced in his State of the Union Address that as his administration makes progress in peace negotiations with the Taliban, "we will be able to reduce our troop's presence [in Afghanistan] and focus on counterterrorism." White House Press Release, Remarks by President Trump in State of the Union Address (Feb. 5, 2019), at <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-state-union-address-2> [<https://perma.cc/PJ6Q-688F>].

<sup>31</sup> Nordland, *supra* note 7.

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

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

<sup>34</sup> Syrian Democratic Forces Press Release, To the Public Opinion (Dec. 20, 2018), at <http://sdf-press.com/en/2018/12/to-the-public-opinion-5> [<https://perma.cc/TC67-V8JP>].

<sup>35</sup> Neil MacFarquhar & Andrew E. Kramer, *Putin Welcomes U.S. Withdrawal from Syria as "Correct,"* N.Y. TIMES (Dec. 20, 2018), at <https://nyti.ms/2RfTrw9>.

Turkey “welcome[d]” Trump’s withdrawal statements and that he would delay an offensive against Kurdish forces in northeastern Syria based on a phone call he had with Trump.<sup>36</sup>

Several days after the announcement, Trump visited U.S. troops stationed at Al Asad Air Base in Iraq and spoke about his decision:

American and coalition forces have had one military victory after another over the last two years against [ISIL], including the retaking of both Mosul in Iraq and Raqqa in Syria. . . .

...

I made it clear from the beginning that our mission in Syria was to strip [ISIL] of its military strongholds; we’re not nation building. Rebuilding Syria will require a political solution. And it’s a solution that should be paid for by its very rich neighboring countries, not the United States. Let them pay for it. And they will. They will.

...

There will be a strong, deliberate, and orderly withdrawal of U.S. forces from Syria—very deliberate, very orderly—while maintaining the U.S. presence in Iraq to prevent an [ISIL] resurgence and to protect U.S. interests, and also to always watch very closely over any potential reformation of [ISIL] and also to watch over Iran. We’ll be watching.<sup>37</sup>

State department officials tried to clarify that despite the announced withdrawal from Syria the “United States is not leaving the Middle East.”<sup>38</sup> Trump stated that there were no plans to pull troops out of Iraq.<sup>39</sup> Pompeo scheduled a visit to Jordan, Egypt, Bahrain, UAE, Qatar, Saudi Arabia, Oman, and Kuwait “to share with them a couple [of] ideas” including that “America is there . . . to do the things that need to be done to protect the American people and to ensure Middle East stability” and that “[t]here’s no change in our commitment to the defeat of the caliphate or of [ISIL] globally” and “no change in our counter-Iran strategy.”<sup>40</sup>

At the time of this writing, no timeline for the U.S. troop withdrawal from Syria has been fully established. State Department officials have shared that “[i]t will be done in such a way that we . . . maintain pressure on [ISIL] throughout, and that we do not open up any vacuums for terrorists to exploit.”<sup>41</sup> National Security Adviser John Bolton has added conditions to the troop withdrawal, telling reporters that American forces will remain in Syria until the

<sup>36</sup> Erin Cunningham & Louisa Loveluck, *Turkey’s Erdogan Delays Operation Against Kurdish Forces in Syria*, WASH. POST. (Dec. 21, 2018), at [https://www.washingtonpost.com/world/middle\\_east/turkeys-erdogan-delays-operation-against-kurdish-forces-in-syria/2018/12/21/ea505452-418f-4d98-bc7d-7ae527c46d18\\_story.html](https://www.washingtonpost.com/world/middle_east/turkeys-erdogan-delays-operation-against-kurdish-forces-in-syria/2018/12/21/ea505452-418f-4d98-bc7d-7ae527c46d18_story.html).

<sup>37</sup> White House Press Release, Remarks by President Trump to Troops at Al Asad Air Base, Al Anbar Province, Iraq (Dec. 26, 2018), at <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-troops-al-asad-air-base-al-anbar-province-iraq> [<https://perma.cc/E7MU-V4A6>] [hereinafter Trump Remarks to Troops].

<sup>38</sup> U.S. Dep’t of State Press Release, Senior State Department Officials Previewing Secretary Pompeo’s Upcoming Trip to the Middle East (Jan. 4, 2019), at <https://www.state.gov/r/pa/prs/ps/2019/01/288333.htm> [<https://perma.cc/XPM2-49JX>] [hereinafter Briefing on Middle East Trip].

<sup>39</sup> Trump Remarks to Troops, *supra* note 37. In Iraq, U.S. forces have been “advising and coordinating with Iraqi forces and providing training, equipment, communications support, intelligence support, and other support to select elements of the Iraqi security forces, including Iraqi Kurdish Security forces.” Letter to Congress, *supra* note 22.

<sup>40</sup> U.S. Dep’t of State Press Release, Interview with Wilfred Frost of CNBC (Jan. 7 2019), at <https://www.state.gov/secretary/remarks/2019/01/288346.htm> [<https://perma.cc/MLC2-YAT4>].

<sup>41</sup> Briefing on Middle East Trip, *supra* note 38.

remnants of ISIL are defeated and Turkey agrees to protect the U.S.-backed Kurdish forces.<sup>42</sup> When questioned about possible tensions between the statements made by Bolton and Trump, Pompeo replied “I think they’ve both said the same thing.”<sup>43</sup> On February 21, 2019, the Trump administration announced that 200 U.S. soldiers would remain in Syria after the withdrawal of the rest of the troops.<sup>44</sup>

#### SETTLEMENT OF DISPUTES

##### *United States Requests Consultations Regarding Peru’s Environmental Obligations Under Bilateral Trade Agreement*

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On January 4, 2019, the United States requested consultations with Peru with respect to its forest governance obligations under the 2007 United States – Peru Trade Promotion Agreement (PTPA).<sup>1</sup> The PTPA has an environmental chapter with robust terms that were included largely at the insistence of members of Congress, reflecting concerns that a free trade agreement with Peru could increase the country’s export of illegally logged wood to the United States.<sup>2</sup> The request for consultations focused on Peru’s decision to relocate its Agency for the Supervision of Forest Resources and Wildlife (OSINFOR) to within Peru’s Ministry of Environment—a change that, in the view of the United States, “appears to conflict” with a PTPA obligation that “OSINFOR shall be an independent and separate agency.”<sup>3</sup>

The PTPA was initially signed in April 2006. In its original form, however, it was unable to obtain the requisite approval from Congress because of concerns that, among other things, its labor and environmental provisions were inadequate.<sup>4</sup> On May 10, 2007, members of Congress reached an understanding with the George W. Bush administration with respect

<sup>42</sup> Steve Holland, *Bolton Says Turkey Must Not Attack Kurdish Fighters Once U.S. Leaves Syria*, REUTERS (Jan. 6, 2019), at <https://www.reuters.com/article/us-mideast-crisis-usa-syria/bolton-says-turkey-must-not-attack-kurdish-fighters-once-u-s-leaves-syria-idUSKCN1P0090>.

<sup>43</sup> U.S. Dep’t of State Press Release, Remarks to Press (Jan. 7, 2019), at <https://www.state.gov/secretary/remarks/2019/01/288349.htm> [<https://perma.cc/K8Z8-VD95>].

<sup>44</sup> Annie Karni & Thomas Gibbons-Neff, *200 U.S. Troops to Stay in Syria, White House Says*, N.Y. TIMES (Feb. 21, 2019), at <https://www.nytimes.com/2019/02/21/world/middleeast/us-troops-syria.html> (reporting that “the move was aimed at encouraging France and Britain to keep troops in Syria, as well as to help secure a safe zone near the Turkish border”).

<sup>1</sup> Office of the U.S. Trade Rep. Press Release, USTR Requests First-Ever Environment Consultations Under the U.S.-Peru Trade Promotion Agreement (PTPA) (Jan. 4, 2019), at <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2019/january/ustr-requests-first-ever> [<https://perma.cc/EKJ9-Y5WJ>] [hereinafter Environment Consultations Request].

<sup>2</sup> M. ANGELES VILLARREAL, CONG. RESEARCH SERV., RL34108, U.S.-PERU ECONOMIC RELATIONS AND THE U.S.-PERU TRADE PROMOTION AGREEMENT 17 (2007).

<sup>3</sup> Environment Consultations Request, *supra* note 1 (quoting from the PTPA).

<sup>4</sup> *Id.* In terms of process, the PTPA was negotiated pursuant to the Bipartisan Trade Promotion Authority Act of 2002, 116 Stat. 933, which ensured that it would receive an up-or-down vote from Congress once it and its implementing legislation were submitted for approval. See VILLARREAL, *supra* note 2, at 1–2.

to the content of the PTPA and future trade agreements.<sup>5</sup> Known as the May 10 Agreement, this understanding specified with respect to environmental protection that certain multilateral environmental agreements, including the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), would be incorporated into these trade agreements and that “all of our [free trade agreement] environmental obligations will be enforced on the same basis as the commercial provisions of our agreements—same remedies, procedures, and sanctions.”<sup>6</sup> With respect to the PTPA in particular, the May 10 Agreement provided that “we have agreed to work with the Government of Peru on comprehensive steps to address illegal logging, including of endangered mahogany, and to restrict imports of products that are harvested and traded in violation of CITES.”<sup>7</sup> The United States then renegotiated the PTPA with Peru so that it incorporated the terms of the May 10 Agreement. The Peru legislature approved this revised PTPA in June 2007, and Congress approved it in December 2007.<sup>8</sup>

The PTPA’s Environment Chapter and the accompanying “Annex on Forest Sector Governance” (Forest Annex) detail these “groundbreaking” obligations.<sup>9</sup> The Environment Chapter commits Peru and the United States to honoring their responsibilities under CITES and certain other multilateral environmental agreements and enforcing their environmental laws implementing these agreements.<sup>10</sup> The Forest Annex is specifically aimed at reducing trade associated with illegal logging.<sup>11</sup> Notably, it allows the United States to investigate Peru’s logging practices through a verification system and to block shipments harvested in violation of CITES.<sup>12</sup>

CITES includes protections for species that are not yet approaching extinction but “may become so unless trade in specimens of such species is subject to strict regulation.”<sup>13</sup> To do so, CITES requires export verification permits for shipments of species or specimens included in its three appendices.<sup>14</sup> These permits must specify among other things that “the specimen was not obtained in contravention of the laws of that State for the protection of fauna and flora.”<sup>15</sup>

<sup>5</sup> Office of the U.S. Trade Representative, Bipartisan Agreement on Trade Policy (May 2007), *available at* [https://ustr.gov/sites/default/files/uploads/factsheets/2007/asset\\_upload\\_file127\\_11319.pdf](https://ustr.gov/sites/default/files/uploads/factsheets/2007/asset_upload_file127_11319.pdf) [hereinafter May 10 Agreement]; *see also* H. Rep. 110-421 (Nov. 5, 2007) (describing the “historic” May 10 Agreement).

<sup>6</sup> May 10 Agreement, *supra* note 5, at 2–3.

<sup>7</sup> *Id.* at 3. For a broader discussion of the ways in which trade agreements incorporate regulatory requirements, *see generally* Paul Mertenskotter & Richard B. Stewart, *Remote Control: Treaty Requirements for Regulatory Procedures*, 104 CORNELL L. REV. 165 (2018). *See also id.* at 216–18 (discussing the PTPA’s environmental provisions).

<sup>8</sup> VILLARREAL, *supra* note 2, at 2; United States-Peru Trade Promotion Agreement Implementation Act, Pub. L. No. 110-138, 121 Stat. 1455 (2007).

<sup>9</sup> Office of the U.S. Trade Rep., Peru Trade Promotion Agreement, *at* <https://ustr.gov/trade-agreements/free-trade-agreements/peru-tpa> [<https://perma.cc/D2HC-6WJC>] [hereinafter USTR Overview of PTPA].

<sup>10</sup> Trade Promotion Agreement, Peru-U.S., Arts. 18.2, 18.3, Annex 18.2 [hereinafter PTPA], *available at* <https://ustr.gov/trade-agreements/free-trade-agreements/peru-tpa/final-text>. Both the United States and Peru are parties to CITES. List of Contracting Parties, Convention on International Trade in Endangered Species of Wild Fauna and Flora, *at* <https://cites.org/eng/disc/parties/chronolo.php>.

<sup>11</sup> PTPA, *supra* note 10, at Annex 18.3.4.

<sup>12</sup> *Id.* at Annex 18.3.4, §§ 6–7, 13(a).

<sup>13</sup> Convention on International Trade in Endangered Species of Wild Fauna and Flora, Art. II, Mar. 3, 1973, 27 UST 1087, 993 UNTS 243.

<sup>14</sup> *Id.* Arts. III, § 2; IV, § 2; V, § 2.

<sup>15</sup> *Id.* Arts. III, § 2(b); IV, § 2(b); V, § 2(a).

Appendix II of CITES specifically protects big leaf mahogany, a type of Peruvian timber mainly imported by the United States.<sup>16</sup>

The PTPA entered into force in February 2009.<sup>17</sup> In the lead-up to its entry into force and in the months that followed, Peru began taking measures to comply with its responsibilities, such as increasing penalties for environmental crimes, dispatching prosecutors to enforce forest sector crimes, and creating a Ministry of Environment to oversee environmental duties.<sup>18</sup> Peru also adopted legislation that increased the budget, functions, and independence of OSINFOR,<sup>19</sup> a government agency tasked with supervising the “verification of all timber concessions and permits.”<sup>20</sup> Nonetheless, concerns about illegal logging and Peru’s compliance persisted over time and continued to be raised by the Office of the U.S. Trade Representative (USTR).<sup>21</sup> In 2016, for example, then-U.S. Trade Representative Michael Froman invoked the timber verification provision, asking Peru to ensure that a particular shipment from a Peruvian exporter, Inversiones La Oroza SRL (Oroza), complied with Peru’s laws and other regulations.<sup>22</sup> The government of Peru proceeded to conduct the “first-ever verification,”<sup>23</sup> which found that “significant portions” of the wood were illegally harvested.<sup>24</sup> In the aftermath of this action, protesters in Peru burned a coffin displaying the name of OSINFOR’s leader, Rolando Navarro, who was subsequently fired and forced to seek asylum in the United States.<sup>25</sup> In 2017, USTR conducted the first enforcement action under the Forest Annex by blocking any future timber shipments from Oroza for up to a period of three years.<sup>26</sup>

<sup>16</sup> PERVAZE A. SHEIKH, CONG. RESEARCH SERV., RL 33932, *ILLEGAL LOGGING BACKGROUND AND ISSUES* 8 (2008).

<sup>17</sup> USTR Overview of PTPA, *supra* note 9.

<sup>18</sup> Office of the U.S. Trade Rep. Press Release, Statement by Ambassador Ron Kirk on the Annex on Forest Sector Governance of the United States-Peru Trade Promotion Agreement (PTPA) (July 30, 2010), at <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2010/july/statement-ambassador-ron-kirk-annex-forest-sector-gov> [<https://perma.cc/6JCE-7QSC>] [hereinafter Ron Kirk on the Forest Annex].

<sup>19</sup> See Matt Finer, Clinton N. Jenkins, Melissa A. Blue Sky & Justin Pine, *Logging Concessions Enable Illegal Logging Crisis in Peruvian Amazon*, 4 SCI. REP. 1, 2 (2014) (noting that “[i]n 2008, OSINFOR did gain greater independence when it was placed within the Presidency of the Council of Ministers”); see also Julia M. Urrunaga, Andrea Johnson, Inés Dhaynee Orbegoza & Fiona Mulligan, *The Laundering Machine: How Fraud and Corruption in Peru’s Concession System Are Destroying the Future of Its Forests*, ENVTL. INVESTIGATION AGENCY 21 (2012) (noting that OSINFOR was previously “financed by revenues from timber harvesting, a structure that created perverse incentives and institutional pressures for an entity charged with monitoring logging activities”).

<sup>20</sup> PTPA, *supra* note 10, at Annex 18.3.4, § 3(h)(iii).

<sup>21</sup> *E.g.*, Ron Kirk on the Forest Annex, *supra* note 18.

<sup>22</sup> Letter from Michael B.G. Froman, U.S. Trade Rep., to Magali Silva Velarde-Alvarez, Minister of Trade and Tourism, Republic of Peru (Feb. 26, 2016), available at <https://ustr.gov/sites/default/files/Request-Letter-to-Peru-02262016.pdf> [<https://perma.cc/9YMC-2U9E>].

<sup>23</sup> Office of the U.S. Trade Rep. Press Release, U.S. Timber Committee Reacts to Peru’s Timber Verification (Aug. 17, 2016), at <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2016/august/us-timber-committee-reacts-peru-timber-verification> [<https://perma.cc/HBA4-NMDL>].

<sup>24</sup> Interagency Comm. on Trade in Timber Products from Peru Press Release, Statement Regarding July 2016 Timber Verification Report from Peru, at 3 (Aug. 17, 2016), available at <https://ustr.gov/sites/default/files/Timber-Committee-Report-8172016.pdf> [<https://perma.cc/SQW2-K5P5>].

<sup>25</sup> Frank Bajak, *AP Investigation Shows Peru Backsliding on Illegal Logging*, ASSOC. PRESS (Apr. 19, 2017), at <https://apnews.com/8f4d73bdc605446c9c64bc2aedf7aa31>.

<sup>26</sup> Office of the U.S. Trade Rep. Press Release, USTR Announces Unprecedented Action to Block Illegal Timber Imports from Peru (Oct. 19, 2017), at <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2017/october/ustr-announces-unprecedented-action> [<https://perma.cc/U3Z6-UQPX>]. The United States has blocked timber shipments from Oroza “for three years or until the [Interagency Committee on Trade in Timber Products from Peru] determines that Oroza has complied with all applicable laws, regulations, and other measures of Peru governing the harvest of and trade in timber products, whichever is shorter.” *Id.*

On January 4, 2019, the United States made its first-ever request for consultations under the environmental chapter of the PTPA.<sup>27</sup> In a press release, USTR explained:

Through these environment consultations, the United States and Peru will discuss and attempt to resolve concerns regarding a recent Peruvian action to move the Agency for the Supervision of Forest Resources and Wildlife (OSINFOR) from its position as a separate and independent agency to a subordinate position within Peru’s Ministry of Environment . . . .<sup>28</sup>

USTR considers that Peru’s relocation of the agency conflicts with a provision in the Forest Annex that provides: “OSINFOR shall be an independent and separate agency and its mandate shall include supervision of verification of all timber concessions and permits.”<sup>29</sup> U.S. Trade Representative Robert Lighthizer explained:

By taking this unprecedented step, the Trump Administration is making clear that it takes monitoring and enforcement of U.S. trade agreements seriously, including obligations to strengthen forest sector governance . . . . Since its creation in 2008, OSINFOR has played a critical role in Peru detecting and combatting illegal logging, and we are gravely concerned that its independence is threatened. I urge Peru to abide by its obligations and restore OSINFOR’s separateness and independence, as called for in the PTPA.<sup>30</sup>

On January 5, 2019, Peru’s Foreign Trade and Tourism Minister, Edgar Vasquez, told Bloomberg Law that, despite the change, “[OSINFOR] continues as an independent and separate agency, adhering to the commitments accepted in the PTPA.”<sup>31</sup>

For any matters arising under the Environment Chapter, including the Forest Annex, the PTPA allows parties to request consultations through the mechanism set forth in that chapter.<sup>32</sup> The request needs to contain “specific and sufficient” information that would enable the receiving party to respond.<sup>33</sup> Upon its delivery, the parties must “make every attempt to arrive at a “mutually satisfactory resolution.”<sup>34</sup> Parties that are unsuccessful at this stage may ask the Environmental Affairs Council, a bilateral committee of senior officials with environmental duties,<sup>35</sup> to convene in an effort to resolve the issue.<sup>36</sup> If the matter remains unsettled within sixty days of the initial request for consultations, the parties may

<sup>27</sup> Environment Consultations Request, *supra* note 1.

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

<sup>29</sup> PTPA, *supra* note 10, at Annex 18.3.4, § 3(h)(iii); *see also* Environment Consultations Request, *supra* note 1 (citing this provision).

<sup>30</sup> Environment Consultations Request, *supra* note 1; *see also* Letter from House Comm. on Ways and Means to Robert Lighthizer, U.S. Trade Rep. (Dec. 19, 2018), *available at* <https://democrats-waysandmeans.house.gov/sites/democrats.waysandmeans.house.gov/files/documents/12.19.18%20USTR%20Peru%20letter.pdf> [<https://perma.cc/V4KF-Q7MG>] (objecting to Peru’s decision to move OSINFOR into another government ministry and describing the decision as “a flagrant attack on the heart of the Forest[] Annex that cannot go unchallenged”).

<sup>31</sup> Lucien O. Chauvin, *Forestry Agency to Maintain Independence, Peru Tells U.S.*, BLOOMBERG LAW (Jan. 7, 2019), *at* [https://www.bloomberglaw.com/document/X7L0SB0G000000?bna\\_news\\_filter=international-trade&jcsearch=BNA%25200000016829c9d327a7fcfd8ab10000#jcite](https://www.bloomberglaw.com/document/X7L0SB0G000000?bna_news_filter=international-trade&jcsearch=BNA%25200000016829c9d327a7fcfd8ab10000#jcite).

<sup>32</sup> PTPA, *supra* note 10, Art. 18.12(1).

<sup>33</sup> *Id.* Art. 18.12(2).

<sup>34</sup> *Id.* Art. 18.12(3).

<sup>35</sup> *Id.* Art. 18.12(4) n.8; *see also id.* Art. 18.6.

<sup>36</sup> *Id.* Art. 18.12(4).

then utilize the procedures contained within the PTPA's Dispute Settlement Chapter.<sup>37</sup> The Dispute Settlement Chapter allows the parties to proceed through consultations, a meeting of the U.S.-Peru Free Trade Commission, and lastly arbitration.<sup>38</sup>

The Trump administration's decision to pursue consultations with Peru comes not long after the signing of the renegotiated North American Free Trade Agreement between the United States, Mexico, and Canada, now known in the United States as the United States-Mexico-Canada Agreement (USMCA). This agreement will be submitted in due course to Congress for approval and implementation.<sup>39</sup> New reports have suggested that, in confronting Peru, the Trump administration is also sending a broader signal that it is serious about enforcing the environmental provisions in trade agreements—a signal that in turn might aid in smoothing the approval of the USMCA in Congress.<sup>40</sup>

#### PRIVATE INTERNATIONAL LAW

##### *Federal Appellate Court Allows Hungarian Holocaust Survivors to Pursue Claims*

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On December 28, 2018, the Court of Appeals for the District of Columbia Circuit held in *Simon v. Republic of Hungary* that fourteen Hungarian Jewish survivors of the Holocaust could continue to pursue their claims against Hungary and its state-owned railway.<sup>1</sup> In a 2–1 decision authored by Judge Millett, the D.C. Circuit reversed the district court decision that had dismissed the case on two alternative grounds—the principle of international comity and the doctrine of *forum non conveniens*.<sup>2</sup> The D.C. Circuit thus remanded the long-running case for further proceedings.<sup>3</sup>

In 2010, the plaintiffs filed suit against Hungary and its government-owned railway, Magyar Államvasutak Zrt. (MÁV), seeking restitution for the seizure and expropriation of their property during Hungary's genocidal campaign against the Jewish people.<sup>4</sup> “In 1944 alone, a concentrated campaign by the Hungarian government marched nearly half a million

<sup>37</sup> *Id.* Art. 18.12(6)–(7).

<sup>38</sup> *Id.* Art. 21.4(6).

<sup>39</sup> For discussion of this agreement and the process it will undergo in pursuit of congressional approval, see Jean Galbraith, *Contemporary Practice of the United States*, 113 AJIL 131, 150 (2019).

<sup>40</sup> Glenn Thrush & Alan Rappoport, *U.S. Accuses Peru of Violating Agreement to Protect Rain Forest*, N.Y. TIMES (Jan. 4, 2019), at <https://www.nytimes.com/2019/01/04/us/politics/peru-rain-forest-protection-violations-trump-administration.html>.

<sup>1</sup> *Simon v. Republic of Hungary*, 911 F.3d 1172, 1176 (D.C. Cir. 2018).

<sup>2</sup> *Id.* at 1176.

<sup>3</sup> *Id.* at 1190.

<sup>4</sup> *Id.* at 1175–76; Complaint at 3–4, *Simon v. Republic of Hungary*, 37 F. Supp. 3d 381 (D.D.C. 2014) (No. 10-cv-01770). The plaintiffs also sued a third defendant, Rail Cargo Hungaria Zrt. but the company was dismissed due to lack of personal jurisdiction. *Simon v. Republic of Hungary*, 37 F. Supp. 3d 381, 444 (D.D.C. 2014).

Jews into Hungarian railroad stations, stripped them of all their personal property and possessions, forced them onto trains, and transported them to death camps like Auschwitz, where 90% of them were murdered upon arrival.”<sup>5</sup> The plaintiffs thus sought restitution for the expropriation of their property by the Hungarian government and MÁV.<sup>6</sup>

An earlier round of litigation established presumptive subject matter jurisdiction under the Foreign Sovereign Immunities Act (FSIA) with respect to MÁV, while leaving the door open for an eventual finding of subject matter jurisdiction with respect to Hungary.<sup>7</sup> On remand from a prior appeal, the district court did not further address subject matter jurisdiction, but instead dismissed the case against both defendants on two alternative grounds.<sup>8</sup> First, relying on the concept of international comity, the court held that the plaintiffs were required to exhaust remedies in Hungary before adjudicating claims in the United States.<sup>9</sup> Second, applying the doctrine of *forum non conveniens*, the court concluded that the claims would be more appropriately brought in Hungary.<sup>10</sup>

The D.C. Circuit reversed both holdings. With respect to international comity, the court reasoned that dismissal on the basis of comity was incompatible with the FSIA in the absence of a statutory requirement of exhaustion. The court explained:

[W]hile we need not definitively resolve the question, there is a substantial risk that the Survivors’ exhaustion of any Hungarian remedy could preclude them by operation of *res judicata* from ever bringing their claims in the United States. . . .

So understood, enforcing what Hungary calls “prudential exhaustion” would in actuality amount to a judicial grant of immunity from jurisdiction in United States courts. But the FSIA admits of no such bar. . . . To the contrary, the whole point of the FSIA was to “abate[] the bedlam” of case-by-case immunity decisions, and put in its place a “comprehensive set of legal standards governing claims of immunity in every civil action against a foreign state.” . . .

. . . Hungary’s exhaustion-cum-immunity argument has no anchor in the FSIA. . . . [T]he FSIA is explicit that, if a statutory exception to immunity applies—as we have squarely held it does at least to MÁV— . . . “[a] foreign state *shall not be immune* from the jurisdiction of

<sup>5</sup> *Simon*, 911 F.3d at 1175.

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

<sup>7</sup> Several years after the suit was filed, the district court dismissed the case against Hungary and MÁV for lack of subject matter jurisdiction, and the plaintiffs appealed. *Simon*, 37 F. Supp. 3d at 397. The D.C. Circuit then reversed in part the lower court’s dismissal, relying on the FSIA’s exception to sovereign immunity with respect to the expropriation of property taken in violation of international law. *Simon v. Republic of Hungary*, 812 F.3d 127, 147–48, 151 (D.C. Cir. 2016). The court held that the plaintiffs adequately alleged jurisdiction over MÁV as an initial matter, while noting that MÁV might later be able to rebut this jurisdiction if it showed that it no longer possessed either “the property or proceeds thereof.” *Id.* at 147. As to Hungary, the D.C. Circuit made this same point but further concluded that the plaintiffs had not adequately pled a commercial activity nexus with the United States. *Id.* at 147–48; *see also de Cespel v. Republic of Hungary*, 859 F.3d 1094, 1104–08 (2017) (further refining circuit case law with respect to what constitutes such a nexus). On remand, the plaintiffs amended their complaint to make more specific allegations with respect to Hungary and the commercial activity nexus. *See Simon v. Republic of Hungary*, 277 F. Supp. 3d 42, 52 (D.D.C. 2017).

<sup>8</sup> *Simon*, 277 F. Supp. 3d at 54; *see also id.* at 52 n.6 (declining to address the issue of subject matter jurisdiction in light of its finding other grounds for dismissal).

<sup>9</sup> *Simon*, 911 F.3d at 1175.

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

courts of the United States or of the States.” Courts cannot end run that congressional command by just relabeling an immunity claim as “prudential exhaustion.”<sup>11</sup>

The D.C. Circuit also reversed the district court’s ruling on *forum non conveniens*, concluding that the lower court committed several legal errors in its analysis and thus abused its discretion in dismissing the case.<sup>12</sup> Judge Millett’s opinion emphasized that under *forum non conveniens*, courts should place a “strong presumption in favor of the plaintiff’s choice,” which can only be overcome “when the private and public interest factors *clearly* point” to the other forum.<sup>13</sup> “[T]he district court’s failure to hold Hungary to that task makes this among ‘the rare case[s]’ in which a district court’s balancing of factors amounts to an abuse of discretion.”<sup>14</sup>

In reversing the district court, the D.C. Circuit emphasized several points. One was that the district court paid too little consideration to the preferences of the plaintiffs, particularly the four U.S. citizen plaintiffs and their “weighty interest [as] Americans [of] seeking justice in their own courts.”<sup>15</sup> Another was that, with respect to the private interests at stake, the district court was “too quick to credit Hungary’s claims and too slow to value the Survivors’ evidence” with respect to issues like the location of evidence, the challenges of translation, and the convenience of witnesses.<sup>16</sup> The D.C. Circuit further considered that the district court misconstrued the public interests at stake when it “concluded that those factors weighed in favor of a Hungarian forum because of Hungary’s ‘stronger’ moral interest in resolving the dispute, the likelihood that Hungarian law would apply to the Survivors’ claims, and the administrative burden the litigation could impose on the court.”<sup>17</sup> The D.C. Circuit noted that “Hungary has had over seventy years to vindicate its interests in addressing its role in the Holocaust” and that in any event “neither party argues that current Hungarian law should apply.”<sup>18</sup> Finally, the court observed that although the United States did not take a position in the district court proceedings, it had filed a brief during the appeal that “advised [the] court that it ha[d] no specific foreign policy or international comity concerns that warrant dismissal of [the] case in favor of a Hungarian . . . forum.”<sup>19</sup>

Judge Katsas dissented from the majority’s conclusion with respect to *forum non conveniens* but did not address the court’s holding with respect to international comity. In his view, the district court “permissibly applied the settled law of *forum non conveniens*” in “conclud[ing] that this foreign-cubed case—involving wrongs committed by Hungarians against Hungarians in Hungary—should be litigated in Hungary.”<sup>20</sup> Emphasizing the “narrow” standard of review, he deemed the district court’s evaluation of the interests at stake and of the balance among them to be within its discretion.<sup>21</sup>

The decision in *Simon* comes at a time when the concept of international comity and the doctrine of *forum non conveniens* are also at issue in other cases involving the expropriation of property

<sup>11</sup> *Id.* at 1180–81 (second alteration in original) (emphasis in original) (omitting internal citations).

<sup>12</sup> *Id.* at 1182.

<sup>13</sup> *Id.* (emphasis in original) (citing *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 255 (1981)).

<sup>14</sup> *Id.* at 1185.

<sup>15</sup> *Id.* at 1183.

<sup>16</sup> *Id.* at 1186–87.

<sup>17</sup> *Id.* at 1187 (citing *Simon*, 277 F. Supp. 3d at 66–67).

<sup>18</sup> *Id.* at 1187–89.

<sup>19</sup> *Id.* at 1189 (internal citations omitted).

<sup>20</sup> *Id.* at 1190 (Katsas, J., dissenting).

<sup>21</sup> *Id.* at 1190–94 (Katsas, J., dissenting).

during the Holocaust. As one example, a case with similarities to *Simon—Scalin v. Société Nationale des Chemins de Fer Français*—is presently before the Court of Appeals for the Seventh Circuit.<sup>22</sup> The plaintiffs in *Scalin* had sued the French national railway for the expropriation of property during the Holocaust but the district court dismissed on the grounds that the plaintiffs had failed to exhaust their remedies and had an alternative forum available to them.<sup>23</sup> In an earlier case involving Hungarian Holocaust survivors, the Seventh Circuit concluded that “principles of international comity make clear that these plaintiffs must attempt to exhaust domestic remedies before foreign courts can provide remedies for those violations.”<sup>24</sup> It remains to be seen whether the tension between the approaches taken in the D.C. and Seventh Circuits will at some point be addressed by the U.S. Supreme Court. In the meantime, both international comity and *forum non conveniens* are the subjects of ongoing attention in legal scholarship.<sup>25</sup>

<sup>22</sup> Notice of Appeal, *Scalin v. Société Nationale des Chemins de Fer Français*, No. 15-cv-03362, 2018 WL 1469015 (N.D. Ill. Apr. 24, 2018).

<sup>23</sup> No. 15-cv-03362, 2018 WL 1469015, at \*1 (N.D. Ill. Mar. 26, 2018).

<sup>24</sup> *Fischer v. Magyar Államvasutak Zrt.*, 777 F.3d 847, 852 (7th Cir. 2015); see also *Abelesz v. Magyar Nemzeti Bank*, 692 F.3d 661, 684 (2012) (reaching a similar holding in a still-earlier case).

<sup>25</sup> E.g., William S. Dodge, *International Comity in American Law*, 115 COLUM. L. REV. 2071, 2110 (2015) (surveying the concept of international comity and emphasizing its domestic legal grounding); Maggie Gardner, *Retiring Forum Non Conveniens*, 92 N.Y.U. L. REV. 390, 391 (2017) (arguing for the abolition of the doctrine of *forum non conveniens*).