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### Contemporary Practice of the United States Relating to International Law (114:1 Am J Int'l L)

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

EDITED BY JEAN GALBRAITH\*

***In this section:***

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\* Karlos Bledsoe, Emily Friedman, Emily Kyle, Beatrix Lu, Rebecca Wallace, and Howard Weiss contributed to the preparation of this section.

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

*United States and United Kingdom Sign the First Bilateral Agreement Pursuant to the CLOUD Act, Facilitating Cross-Border Access to Data*

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On October 3, 2019, the United States and the United Kingdom reached a bilateral agreement to facilitate more efficient data access between the two countries for law enforcement purposes. The Agreement on Access to Electronic Data for the Purpose of Countering Serious Crime (U.S.-UK Data Access Agreement) was signed by U.S. Attorney General William Barr and UK Home Secretary Priti Patel.<sup>1</sup> This is the first such agreement made by the United States after the passage of the 2018 Clarifying Lawful Overseas Use of Data (CLOUD) Act, which authorizes and structures future bilateral agreements on data sharing. Pursuant to the CLOUD Act, Congress has 180 days following receipt of a notification regarding the U.S.-UK Data Access Agreement to block its entry into force via a joint resolution, which would require a majority vote in both houses of Congress and either presidential signature or a subsequent congressional override of a presidential veto.

Cross-border data requests for law enforcement purposes have traditionally depended on mutual legal assistance treaties (MLATs). Obtaining data through the processes established in MLATs can take many months.<sup>2</sup> In 2018, Congress passed the CLOUD Act which, among other things, creates “a framework that allows U.S. service providers to disclose U.S.-stored data to certain foreign countries pursuant to lawful foreign orders.”<sup>3</sup> Under this framework, the United States may enter into bilateral agreements with “rights-respecting countries that abide by the rule of law” whom the attorney general has determined meet certain specified statutory criteria.<sup>4</sup> Once such a bilateral agreement is in force, it has the effect of “lift[ing] any restrictions under U.S. law on companies disclosing electronic data directly to foreign authorities for covered orders in investigations of serious crimes”—an effect that “would permit U.S.-based global [communications service providers] to respond directly to foreign legal process in many circumstances.”<sup>5</sup> Similarly, the bilateral agreements contemplated by the CLOUD Act can lift

<sup>1</sup> Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United States of America on Access to Electronic Data for the Purpose of Countering Serious Crime (Oct. 3, 2019), *available at* [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/836969/CS\\_USA\\_6.2019\\_Agreement\\_between\\_the\\_United\\_Kingdom\\_and\\_the\\_USA\\_on\\_Access\\_to\\_Electronic\\_Data\\_for\\_the\\_Purpose\\_of\\_Countering\\_Serious\\_Crime.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/836969/CS_USA_6.2019_Agreement_between_the_United_Kingdom_and_the_USA_on_Access_to_Electronic_Data_for_the_Purpose_of_Countering_Serious_Crime.pdf) [<https://perma.cc/G9EZ-GSUR>] [hereinafter U.S.-UK Data Access Agreement].

<sup>2</sup> See Peter Swire & Justin D. Hemmings, *Mutual Legal Assistance in an Era of Globalized Communications: The Analogy to the Visa Waiver Program*, 71 N.Y.U. ANN. SURV. AM. L. 687, 708 (2017) (noting that on average, successful requests for data made pursuant to MLATs take ten months once requests are made).

<sup>3</sup> Jean Galbraith, *Contemporary Practice of the United States*, 112 AJIL 487, 487 (2018). The CLOUD Act also amended a federal statute to make clear that U.S. law enforcement could use warrants to obtain electronic data stored overseas by U.S. companies—an amendment that rendered moot a pending Supreme Court case on the issue. *See id.* at 488–89.

<sup>4</sup> U.S. DEP’T OF JUSTICE, PROMOTING PUBLIC SAFETY, PRIVACY, AND THE RULE OF LAW AROUND THE WORLD: THE PURPOSE AND IMPACT OF THE CLOUD ACT 4, 6, 10 (Apr. 2019), *available at* [https://www.justice.gov/opa/press-release/file/1153446/download?utm\\_medium=email&utm\\_source=govdelivery](https://www.justice.gov/opa/press-release/file/1153446/download?utm_medium=email&utm_source=govdelivery) [<https://perma.cc/PK9F-84A5>] [hereinafter DOJ White Paper on CLOUD Act]; *see also* Clarifying Lawful Overseas Use of Data (CLOUD) Act, 18 U.S.C. § 2523(b) (2018), *available at* <https://www.justice.gov/dag/page/file/1152896/download> [hereinafter CLOUD Act].

<sup>5</sup> DOJ White Paper on CLOUD Act, *supra* note 4, at 4.

restrictions under the law of the partner nation that might otherwise complicate the ability of U.S. law enforcement to gain access to data.<sup>6</sup> The CLOUD framework thus provides an additional, more efficient path to data sharing without eliminating prior protocols such as MLATs.<sup>7</sup> Both the CLOUD Act and the U.S.-UK Data Access Agreement had the strong support of UK law enforcement officials.<sup>8</sup>

As the first international agreement made by the United States pursuant to the CLOUD Act, the text of the U.S.-UK Data Access Agreement may become a model for similar agreements in the future. Article 1 provides definitions, including one on the threshold issue of what constitutes a “serious crime”—a term that was left undefined in the CLOUD Act.<sup>9</sup> The purpose of the U.S.-UK Data Access Agreement, given in Article 2, is:

[T]o advance public safety and security, and to protect privacy, civil liberties, and an open Internet, by resolving potential conflicts of legal obligations when communications service providers are served with Legal Process from one Party for the production or preservation of electronic data, where those providers may also be subject to the laws of the other Party.<sup>10</sup>

Article 3 sets forth the core requirement that neither country’s domestic laws shall prevent one of its companies from responding to appropriate data requests from the other country.<sup>11</sup> Article 4 specifies who are appropriate underlying targets of data requests, making clear that the United Kingdom cannot intentionally target U.S. citizens, legal permanent residents, or persons on U.S. territory, and conversely that the United States cannot intentionally target persons on UK territory.<sup>12</sup> Articles 5 through 10 provide further substantive and procedural

<sup>6</sup> See *id.* at 4–5 (noting, however, that “the United States currently receives many more requests for electronic data than it submits to other countries,” presumably because many communications service providers are based in the United States).

<sup>7</sup> STEPHEN P. MULLIGAN, CONG. RESEARCH SERV., R45173, CROSS-BORDER DATA SHARING UNDER THE CLOUD ACT 23 (Apr. 23, 2018), available at <https://fas.org/sgp/crs/misc/R45173.pdf> [<https://perma.cc/X49C-FJHE>] (observing that “[e]xecutive agreements authorized by the CLOUD Act would supplement, not replace, existing avenues of international data sharing” and “[a]ccordingly, requests for assistance would still be available through MLATs (when in effect)”).

<sup>8</sup> See Law Enforcement Access to Data Stored Across Borders: Facilitating Cooperation and Protecting Rights: Hearing Before the Subcomm. on Crime and Terrorism of the S. Comm. on the Judiciary, 115th Cong. (2017); UK Government Press Release, UK and US Sign Landmark Data Access Agreement (Oct. 4, 2019), at <https://www.gov.uk/government/news/uk-and-us-sign-landmark-data-access-agreement> [<https://perma.cc/2458-WB4C>]. The press release issued by the government of the United Kingdom following the signature of the U.S.-UK Data Access Agreement noted that: “The UK has obtained assurances which are in line with the government’s continued opposition to the death penalty in all cases.” *Id.*; see also U.S.-UK Data Access Agreement, *supra* note 1, Art. 8(4) (setting up special requirements where the United States is seeking data access for purposes of a death penalty case and where the United Kingdom is seeking access for purposes of a case that “raises freedom of speech concerns for the United States”).

<sup>9</sup> U.S.-UK Data Access Agreement, *supra* note 1, Art. 1(5), 1(14) (establishing that “Covered Offense means conduct that, under the law of the Issuing Party, constitutes a Serious Crime, including terrorist activity” and “Serious Crime means an offense that is punishable by a maximum term of imprisonment of at least three years”); CLOUD Act, 18 U.S.C. § 2523(a) (failing to define “serious crimes” in the definitions section).

<sup>10</sup> U.S.-UK Data Access Agreement, *supra* note 1, Art. 2.

<sup>11</sup> *Id.* Art. 3.

<sup>12</sup> *Id.* Art. 4; see also UK Home Office, Explanatory Memorandum to the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United States of America on Access to Electronic Data for the Purpose of Countering Serious Crime, Cm. 178, at 14 (2018), at <https://www.gov.uk/government/publications/ukusa-agreement-on-access-to-electronic-data-for-the-purpose->

rules for data requests, including ones intended to advance privacy interests.<sup>13</sup> As one notable example, Article 5 provides that “[o]rders subject to this Agreement shall be subject to review or oversight under the domestic law of the Issuing Party by a court, judge, magistrate, or other independent authority prior to, or in proceedings regarding, enforcement of the Order.”<sup>14</sup> Article 11 stresses “[c]ompatibility and [n]on-exclusivity” with respect to existing MLATs.<sup>15</sup> Articles 12 through 16 describe implementation procedures, including with respect to entry into force, responsibility for costs, and the process for amendments.<sup>16</sup> Finally, Article 17 sets forth an initial five-year term for the agreement, subject to mutually agreed-upon renewal, and separately provides that either party may terminate at any time on one month’s notice.<sup>17</sup>

For the U.S.-UK Data Access Agreement to enter into force, the parties must exchange diplomatic notes to that effect.<sup>18</sup> For the United States, this process will take at least 180 days from when Congress receives official notification of the signed agreement and also receives a certification by the attorney general that the UK is an appropriate bilateral partner for purposes of agreements made pursuant to the CLOUD Act.<sup>19</sup> The CLOUD Act further sets forth streamlined procedures for consideration of such executive agreements by the House of Representatives and the Senate, including provisions ensuring that appropriately introduced joint resolutions of disapproval will receive up-or-down votes following committee review.<sup>20</sup> Some privacy advocates have urged the pursuit of such a joint resolution, arguing among other things that the U.S.-UK Data Access Agreement has too low a standard for

of-countering-serious-crime-cs-usa-no62019 [ <https://perma.cc/XE4S-4W5A>] (indicating the restriction on intentional targeting by the United States was limited to those on the UK’s territory rather than also including UK citizens because of “EU law which prohibits discrimination in treatment between citizens of different member states.”).

<sup>13</sup> U.S.-UK Data Access Agreement, *supra* note 1, Arts. 5–10.

<sup>14</sup> *Id.* Art. 5(2). Earlier in 2019, the United Kingdom passed an act setting forth a domestic process by which such court orders could be obtained. See UK Government Press Release, Crime (Overseas Production Orders) Bill Receives Royal Assent (Feb. 12, 2019), at <https://www.gov.uk/government/news/crime-overseas-production-orders-bill-receives-royal-assent> [<https://perma.cc/6H7B-QUJ5>]. The U.S.-UK Data Access Agreement also provides that the issuing nations may neither issue requests on behalf of third-party nations nor share data with third-party nations, U.S.-UK Data Access Agreement, *supra* note 1, Arts. 5(4), 8(2); that a provider receiving service of process has the right to challenge an order “when it has reasonable belief that the Agreement may not properly be invoked with regard to the Order,” *id.* Art. 5(11–12); and that there should be “minimization procedures” whereby the UK will “minimize the acquisition, retention, and dissemination of information concerning U.S. Persons acquired pursuant to an Order,” *id.* Art. 7.

<sup>15</sup> *Id.* Art. 11.

<sup>16</sup> *Id.* Arts. 12–16.

<sup>17</sup> *Id.* Art. 17; see also CLOUD Act, 18 U.S.C. § 2523(e)(1) (providing that the attorney general must renew on five-year bases the determination that the other country is an appropriate partner for purposes of executive agreements made pursuant to the CLOUD Act).

<sup>18</sup> U.S.-UK Data Access Agreement, *supra* note 1, Art. 16. It is unclear whether Brexit, should it occur, would impact the timeline. Following Brexit, the UK might need to undergo an “adequacy determination” by EU officials to determine the adequacy of UK data privacy and security before data is permitted to be moved between the UK and EU member states. Kurt Wimmer & Joseph Jones, *Brexit and Implications for Privacy*, 40 FORDHAM INT’L L.J. 1553, 1558–59 (2017). It is unclear the extent to which, should such an adequacy determination need to occur, an agreement like the U.S.-UK Data Access Agreement might be relevant to that determination.

<sup>19</sup> CLOUD Act, 18 U.S.C. § 2523(d)(2).

<sup>20</sup> *Id.*, § 2523(d)(5)–(6); see also *id.*, § 2523(d)(4) (providing that such a resolution can be introduced in either house by the majority or minority leader or, in the Senate, by the designee of one of these leaders).

triggering data gathering, including wiretaps, and does not clearly specify that judicial oversight must occur prior to data collection.<sup>21</sup>

Overall, the CLOUD Act set the stage for a shift away from the traditional MLATs, and the U.S.-UK Data Access Agreement begins the implementation of this shift. As the first bilateral CLOUD Act agreement, it may serve as a model for future such agreements. The U.S. attorney general and Australian minister for home affairs announced on October 7, 2019, that the two nations are formally negotiating an agreement under the CLOUD Act.<sup>22</sup> Additionally, in June of 2019, the Council of the European Union formally authorized the European Commission to “open negotiations for an agreement between the Union and the United States of America on cross-border access by judicial authorities in criminal proceedings to electronic evidence held by a service provider.”<sup>23</sup>

*United States Remains in the Universal Postal Union, Rescinding Its Notice of Withdrawal*  
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On September 25, 2019, the Third Extraordinary Congress of the Universal Postal Union (UPU) adopted a proposal on terminal dues rates—a decision that led the United States to remain a member state. The United States had given its one-year notice of withdrawal from the UPU eleven months earlier, citing concerns that the existing system unfairly advantaged

<sup>21</sup> Coalition letter from EPIC et. al. to U.S. Members of Congress (Oct. 29, 2019), available at <https://www.whistleblower.org/sign-on-letter/sign-on-coalition-statement-re-u-s-u-k-cloud-act-executive-agreement> [<https://perma.cc/9Y67-P3XT>] (observing that “the text of the U.S.-U.K. Agreement requires that orders for content, widely considered the most sensitive electronic data, only meet the standard of ‘reasonable justification based on articulable and credible facts, particularly, legality, and severity’” and stating that this “standard is vague . . . and likely is weaker than probable cause in various contexts”). By contrast, Jennifer Daskal and Peter Swire describe the U.S.-UK Data Access Agreement and the underlying CLOUD Act as “positive developments that protect privacy and civil liberties, accommodate divergent norms across borders, and respond to the reality that digital evidence critical even to wholly local crimes is often located across international borders.” Jennifer Daskal & Peter Swire, *The UK-US CLOUD Act Agreement Is Finally Here, Containing New Safeguards*, JUST SECURITY (Oct. 8, 2019), at <https://www.justsecurity.org/66507/the-uk-us-cloud-act-agreement-is-finally-here-containing-new-safeguards>.

<sup>22</sup> U.S. Dep’t of Justice Press Release, Joint Statement Announcing United States and Australian Negotiation of a CLOUD Act Agreement by U.S. Attorney General William Barr and Minister for Home Affairs Peter Dutton (Oct. 7, 2019), at <https://www.justice.gov/opa/pr/joint-statement-announcing-united-states-and-australian-negotiation-cloud-act-agreement-us> [<https://perma.cc/MH2H-ZVEX>].

<sup>23</sup> Council of the European Union, Council Decision Authorising the Opening of Negotiations with a View to Concluding an Agreement Between the European Union and the United States of America on Cross-Border Access to Electronic Evidence for Judicial Cooperation in Criminal Matters, COPEN 268 USA 45, 10128/19 (June 12, 2019), available at <https://data.consilium.europa.eu/doc/document/ST-10128-2019-INIT/en/pdf> [<https://perma.cc/2XJF-KUZC>]; cf. European Data Protection Supervisor, Initial Legal Assessment of the Impact of the US CLOUD Act on the EU Legal Framework for the Protection of Personal Data and the Negotiations of an EU-US Agreement on Cross-Border Access to Electronic Evidence (July 10, 2019), available at [https://edpb.europa.eu/sites/edpb/files/files/file2/edpb\\_edps\\_joint\\_response\\_us\\_cloudact\\_annex.pdf](https://edpb.europa.eu/sites/edpb/files/files/file2/edpb_edps_joint_response_us_cloudact_annex.pdf) [<https://perma.cc/2FY7-YWYB>] (assessing some legal issues related to the CLOUD Act and its interaction with the EU’s General Data Protection Regulation).

certain developing nations, including China. Following the UPU's decision, the United States rescinded its notice of withdrawal. Under the new system, the United States can begin self-posting terminal dues rates in July 2020.

On August 23, 2018, President Trump issued a memorandum laying out the priorities of the administration in its negotiations at the UPU.<sup>1</sup> This memorandum focused on the rates that post offices in different countries charge each other for the delivery of international mail. Under the existing UPU framework, which stemmed back to 1969, terminal due rates were based on a country classification system whereby developed nations such as the United States paid more than developing nations.<sup>2</sup> In the memorandum, Trump expressed concern about this system and stated:

- (A) the United States, along with other member countries of the UPU, is in many cases not fully reimbursed by the foreign postal operator for the cost of delivering foreign-origin letter post items, which can result in substantial preferences for foreign mailers relative to domestic mailers;
- (B) the current terminal dues rates undermine the goal of unrestricted and undistorted competition in cross-border delivery services because they disadvantage non-postal operators seeking to offer competing collection and outward transportation services for goods covered by terminal dues in foreign markets; and
- (C) the current system of terminal dues distorts the flow of small packages around the world by incentivizing the shipping of goods from foreign countries that benefit from artificially low reimbursement rates.<sup>3</sup>

The memorandum also observed that if U.S. concerns were not promptly addressed by the UPU, the United States would “consider taking any appropriate actions” to ensure its criteria were met.<sup>4</sup>

While Trump's memorandum did not discuss China by name, his concerns had particular resonance with respect to that country. Peter Navarro, the White House director of trade and manufacturing policy, later wrote in an opinion piece:

[U]nder the [UPU]'s antiquated “terminal dues” system, the United States Postal Service was being forced to subsidize a flood of small packages, primarily from China, at an annual cost in the neighborhood of \$500 million.

<sup>1</sup> Modernizing the Monetary Reimbursement Model for the Delivery of Goods Through the International Postal System and Enhancing the Security and Safety of International Mail, 83 Fed. Reg. 183 (Aug. 23, 2018) [hereinafter Presidential Memorandum].

<sup>2</sup> See *id.*; Universal Postal Union, *About Terminal Dues and Transit Charges*, at <http://www.upu.int/en/activities/terminal-dues-and-transit-charges/about-terminal-dues-and-transit-charges.html> [<https://perma.cc/5ZUZ-QPZT>].

<sup>3</sup> Presidential Memorandum, *supra* note 1.

<sup>4</sup> *Id.* For more information, see Eliot Kim, *Withdrawal from the Universal Postal Union: A Guide for the Perplexed*, LAWFARE (Oct. 31, 2018), at <https://www.lawfareblog.com/withdrawal-universal-postal-union-guide-perplexed>.

This forced subsidy gave China an unfair advantage against American manufacturers and workers . . . .<sup>5</sup>

Several months after Trump's memorandum, the UPU held its Second Extraordinary Congress.<sup>6</sup> Following unsuccessful negotiations, on October 15, 2018, Secretary of State Mike Pompeo notified the UPU that the United States "hereby denounces the UPU Constitution and, thereby, withdraws from the Universal Postal Union. Pursuant to Article 12 of the Constitution, the withdrawal of the United States shall be effective one year after the day on which you receive this notice of denunciation."<sup>7</sup> The United States was a founding member of the UPU, as a signatory to the 1874 Treaty of Berne,<sup>8</sup> and had an "unbroken record of participation" in it.<sup>9</sup> In a statement regarding the withdrawal, the Trump administration announced that "the Department of State will seek to negotiate bilateral and multilateral agreements that resolve the problems discussed in the Presidential Memorandum. If negotiations are successful, the administration is prepared to rescind the notice of withdrawal and remain in the UPU."<sup>10</sup> Media reports characterized the exit as another move in growing trade tensions with China.<sup>11</sup>

After the United States gave its notice of withdrawal, the UPU called for a Third Extraordinary Congress, as recommended by the UPU's Council of Administration.<sup>12</sup> The Third Extraordinary Congress convened in Geneva, Switzerland, from September 23–26, 2019.<sup>13</sup> Leading the negotiations for the United States, Navarro offered support for two potential resolutions with respect to terminal dues rates: first for a measure where "all members of the UPU would be allowed to immediately self-declare rates;"<sup>14</sup> or second for a

<sup>5</sup> Peter Navarro, Opinion, *The Trump Guide to Diplomacy*, N.Y. TIMES (Oct. 15, 2019), at <https://www.nytimes.com/2019/10/15/opinion/trump-universal-postal-union.html>.

<sup>6</sup> The UPU can call an Extraordinary Congress outside of its usual four-year sessions with the consent of two-thirds of its member countries. Constitution of the Universal Postal Union, Art. 15, July 10, 1964, 16 UST 1291, 611 UNTS 7. The First Extraordinary Congress was held in 1900 and, in 2016, the UPU decided to hold a Second Extraordinary Congress in 2018. Universal Postal Union, *2018 Extraordinary Congress*, at <http://www.upu.int/en/the-upu/congress/past-congresses/2018-extraordinary-congress.html> [<https://perma.cc/73JJ-BSY2>].

<sup>7</sup> U.S. STATE DEP'T, DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 113–14 (2018), available at <https://www.state.gov/wp-content/uploads/2019/10/2018-Digest-Chapter-4.pdf> [<https://perma.cc/VG5D-PS56>]; see also Jean Galbraith, *Contemporary Practice of the United States*, 113 AJIL, 136–37 (2019) (providing more detail).

<sup>8</sup> See Galbraith, *supra* note 7, at 138 (also noting that the United States joined the Treaty of Berne "not via the advice and consent of the Senate, but rather as an *ex ante* congressional-executive agreement that relied on preexisting authority delegated by Congress to the president and the post-master general").

<sup>9</sup> Presidential Memorandum, *supra* note 1.

<sup>10</sup> White House Press Release, Statement from the Press Secretary (Oct. 17, 2018), at <https://www.whitehouse.gov/briefings-statements/statement-press-secretary-38> [<https://perma.cc/LQ8V-BAHR>].

<sup>11</sup> See, e.g., Glenn Thrush, *Trump Opens New Front in His Battle With China: International Shipping*, N.Y. TIMES (Oct. 17, 2018), at <https://www.nytimes.com/2018/10/17/us/politics/trump-china-shipping.html>; Danielle Paquette, *Trump Ditches 144-Year-Old Postal Pact that Boosts Chinese Retailers*, WASH. POST (Oct. 17, 2018), at [https://www.washingtonpost.com/business/economy/trump-ditches-144-year-old-postal-pact-that-boosts-chinese-retailers/2018/10/17/88aefea6-d234-11e8-8c22-fa2ef74bd6d6\\_story.html](https://www.washingtonpost.com/business/economy/trump-ditches-144-year-old-postal-pact-that-boosts-chinese-retailers/2018/10/17/88aefea6-d234-11e8-8c22-fa2ef74bd6d6_story.html); see also Galbraith, *supra* note 7, at 132.

<sup>12</sup> Universal Postal Union, *About Congress*, at <http://www.upu.int/en/the-upu/congress/about-congress.html> [<https://perma.cc/8D65-BQ95>].

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

<sup>14</sup> U.S. Mission to Int'l Orgs. in Geneva Press Release, Peter Navarro, Assistant to the President & Dir. of the Office of Trade and Mfg. Policy, Remarks Before the Universal Postal Union Third Extraordinary Congress (Sept.



“multispeed option,” which “would allow the United States to immediately self-declare rates while other countries would achieve that goal over a five-year period.”<sup>15</sup> The option preferred by the United States, to immediately move for self-declared rates, was rejected by the UPU Congress on the first day of the session by a vote of 78–57.<sup>16</sup> China was amongst those countries opposing this option.<sup>17</sup>

The next day, on September 25, the UPU membership unanimously adopted a proposal along the lines of the other option proposed by Navarro.<sup>18</sup> The UPU press release announcing the adoption of this proposal stated:

The agreement approved by acclamation by member countries on 25 September sees the UPU accelerate rate increases to the system for remunerating the delivery of inbound international bulky letters and small packets. Self-declared rates are to be phased in starting as soon as 2020.

Under the agreed solution, member countries that meet certain requirements – including inbound letter-post volumes in excess of 75,000 metric tonnes—would be able to opt-in to self-declare their rates starting 1 July 2020. Thresholds are included to protect low-volume, developing countries from the impact of the swift reform.<sup>19</sup>

Media reports indicate that the United States, which has above 75,000 tons of mail imports, can start setting its rates on July 1, 2020, and other high-volume importers can start implementing their own rates in 2021 with a five-year phase-in period.<sup>20</sup> Following the proposal’s adoption, the United States gave formal notice that it would remain in the UPU.<sup>21</sup>

China expressed support for “a positive solution and compromise in the spirit of UPU.”<sup>22</sup> The Chinese Postal Bureau Deputy Director Gao Hongtao stated that China expected to pay almost triple for terminal dues in the future and that this would “push up the cost of

24, 2019), at <https://geneva.usmission.gov/2019/09/24/remarks-of-peter-navarro-before-the-universal-postal-union-third-extraordinary-congress> [<https://perma.cc/S76M-X4ML>].

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

<sup>16</sup> Jamey Keaten, *World Postal Union Rejects Trump’s Favored Reform Platform*, ASSOC. PRESS (Sept. 24, 2019), at <https://apnews.com/30d73d7eb31241709ea3aee64afb23bb>.

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

<sup>18</sup> See Universal Postal Union Press Release, UPU Third Extraordinary Congress Wraps with Strong Solidarity Message (Sept. 26, 2019), at [http://news.upu.int/no\\_cache/nd/upu-third-extraordinary-congress-wraps-with-strong-solidarity-message](http://news.upu.int/no_cache/nd/upu-third-extraordinary-congress-wraps-with-strong-solidarity-message) [<https://perma.cc/B9S5-HWKW>] [hereinafter UPU Press Release]; U.S. Mission to Int’l Orgs. in Geneva Press Release, Peter Navarro, Assistant to the President & Dir. of the Office of Trade and Mfg. Policy, Press Statement (Sept. 25, 2019), at <https://geneva.usmission.gov/2019/09/25/58203> [<https://perma.cc/Q3P9-AYT2>].

<sup>19</sup> UPU Press Release, *supra* note 18.

<sup>20</sup> Stephanie Nebehay, *U.N. Postal Union Clinches Deal to Keep U.S. in Club*, REUTERS (Sept. 25, 2019), at <https://www.reuters.com/article/us-un-postal/un-postal-union-clinches-deal-to-keep-us-in-club-idUSKBN1WA247>. For more details on the specifics, see Universal Postal Union, *Option V – Moving Towards Self-Declared Rates*, YOUTUBE (Oct. 16, 2019), available at <https://www.youtube.com/watch?v=WOZJV6HunYQ>.

<sup>21</sup> Universal Postal Union Press Release, UPU Head Meets with US President Following Geneva Agreement on Remuneration Rates (Oct. 16, 2019), at [http://news.upu.int/no\\_cache/nd/upu-head-meets-with-us-president-following-geneva-agreement-on-remuneration-rates](http://news.upu.int/no_cache/nd/upu-head-meets-with-us-president-following-geneva-agreement-on-remuneration-rates) [<https://perma.cc/2FLB-LZQC>].

<sup>22</sup> Nebehay, *supra* note 20 (quoting a member of the Chinese delegation to the UPU).

cross-border e-commerce logistics in China, bringing a certain impact,” but that the impact would be small as China would also receive a greater amount in terminal dues.<sup>23</sup>

Since Trump took office, the United States has withdrawn from a number of international agreements, including the Optional Protocol to the Vienna Convention on Diplomatic Relations, the Intermediate-Range Nuclear Forces Treaty, and the United Nations Educational, Scientific and Cultural Organization.<sup>24</sup> Unlike with the UPU, the notices of withdrawal given with respect to these agreements did not lead to renegotiation and the rescission of the withdrawals. Media reports indicate that the administration is considering withdrawing from yet another multilateral treaty, the Open Skies Treaty, which allows parties to engage in unarmed surveillance missions over each other’s territories.<sup>25</sup>

INTERNATIONAL OCEANS, ENVIRONMENT, HEALTH, AND AVIATION LAW

*United States Gives Notice of Withdrawal from Paris Agreement on Climate Change*  
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On November 4, 2019, the Trump administration notified the United Nations that the United States was withdrawing from the Paris Agreement, prompting expressions of regret from a number of countries. Although President Trump had announced in June 2017 that the United States intended to withdraw from the Paris Agreement, its terms had prevented the United States from giving formal notice of withdrawal until November 4, 2019. The withdrawal will take effect on November 4, 2020. Domestically, the governors of many U.S. states responded to the withdrawal by reaffirming their commitment to the goals of the Paris Agreement, consistent with recurring tensions between the Trump administration and progressive states with respect to climate. In another major manifestation of these tensions, on October 23, 2019, the United States sued California over the state’s cap-and-trade agreement with Quebec, Canada, alleging that this agreement is an unconstitutional exercise of foreign affairs powers.

Opened for signature in April of 2016, the Paris Agreement seeks to maintain the global average temperature “well below 2°C above pre-industrial levels and pursu[e] efforts to limit the temperature increase to 1.5°C above pre-industrial levels.”<sup>1</sup> Each state party is required to “prepare, communicate and maintain successive nationally

<sup>23</sup> *China Says Postal Fees to Rise After US Complaint*, ASSOC. PRESS (Oct. 15, 2019), at <https://apnews.com/1e7020752c854accb3279aaba52cfb14>.

<sup>24</sup> For more details, see generally Galbraith, *supra* note 7; Jean Galbraith, *Contemporary Practice of the United States*, 112 AJIL 107 (2018).

<sup>25</sup> David Welna, *Closing the Open Skies*, NPR (Nov. 3, 2019), at <https://www.npr.org/2019/11/03/775818736/closing-the-open-skies>.

<sup>1</sup> Paris Agreement, Art. 2(1)(a), *opened for signature* Apr. 22, 2016, TIAS No. 16-1104.

determined contributions [NDCs] that it intends to achieve.”<sup>2</sup> Additionally, under the Paris Agreement, “[d]eveloped country Parties shall provide financial resources to assist developing country Parties with respect to both mitigation and adaptation in continuation of their existing obligations under the [United Nations Framework Convention on Climate Change].”<sup>3</sup> The Paris Agreement entered into force on November 4, 2016, thirty days after fifty-five nations became party to it.<sup>4</sup> Currently, there are 187 parties to the Paris Agreement.<sup>5</sup>

The United States signed the Paris Agreement on April 22, 2016,<sup>6</sup> and deposited its instrument of acceptance on September 3, 2016.<sup>7</sup> In having the United States join the Paris Agreement, the Obama administration acted without seeking or receiving specific congressional authorization to do so, concluding that the executive branch had the domestic authority to make this commitment on behalf of the United States.<sup>8</sup> In its 2016 NDC, the United States pledged to “reduc[e] its greenhouse gas emissions by 26–28 per cent below its 2005 level in 2025 and to make best efforts to reduce its emissions by 28%.”<sup>9</sup>

In June 2017, Trump announced that “the United States [would] withdraw from the Paris climate accord . . . but begin negotiations to reenter either the Paris accord or an . . . entirely new transaction on terms that are fair to the United States, its businesses, its workers, its people, its taxpayers.”<sup>10</sup> He stated that the United States was “ceas[ing] all implementation of the

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

<sup>3</sup> *Id.* Art. 9(1).

<sup>4</sup> Depositary Notification, Sec’y-Gen. of UN, Paris Agreement, Paris, Dec. 12, 2015, Entry into Force (Oct. 5, 2016), available at <https://treaties.un.org/doc/Publication/CN/2016/CN.735.2016-Eng.pdf> [<https://perma.cc/VAX7-2RP5>] [hereinafter Paris Agreement Depositary Notification, Entry into Force].

<sup>5</sup> Depositary Status for the Paris Agreement, Sec’y-Gen. of UN, available at [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsq\\_no=XXVII-7-d&chapter=27&lang=\\_en&clang=\\_en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsq_no=XXVII-7-d&chapter=27&lang=_en&clang=_en) [<https://perma.cc/NQF6-2T5Y>].

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

<sup>7</sup> Depositary Notification, Sec’y Gen. of UN, Paris Agreement, Paris, Dec. 12, 2015, United States of America: Acceptance (Sept. 3, 2016), available at <https://treaties.un.org/doc/Publication/CN/2016/CN.612.2016-Eng.pdf> [<https://perma.cc/8K2E-B5QG>].

<sup>8</sup> See White House Press Release, Press Briefing by Press Secretary Josh Earnest, Deputy NSA for Strategic Communications Ben Rhodes, Senior Advisor Brian Deese and Deputy NSA for International Economics Wally Adeyemo (Aug. 29, 2016), at <https://obamawhitehouse.archives.gov/the-press-office/2016/08/29/press-briefing-press-secretary-josh-earnest-deputy-nsa-strategic> [<http://perma.cc/YD9B-UFX5>] (“[T]he Paris agreement is an executive agreement. And so the President will use his authority that has been used in dozens of executive agreements in the past to join and formally deposit our instrument of acceptance and therefore put our country as a party to the Paris agreement.”); U.S. State Dep’t Press Release, Senior State Department Official on the Paris Agreement Signing Ceremony (Apr. 20, 2016), at <https://2009-2017.state.gov/t/pa/prs/ps/2016/04/256415.htm> [<http://perma.cc/MK3F-8MKF>] (“With respect to the Paris agreement . . . we have a standard State Department exercise that we are currently going through for authorizing an executive agreement . . .”). In reporting the Agreement to Congress, the Obama administration cited a number of sources of legal authority for concluding it as an executive agreement, including the preexisting United Nations Framework Convention on Climate Change. See Curtis A. Bradley & Jack L. Goldsmith, *Presidential Control Over International Law*, 131 HARV. L. REV. 1201, 1250 (2018).

<sup>9</sup> United States, First NDC Submission (2016), available at <https://www4.unfccc.int/sites/ndcstaging/PublishedDocuments/United%20States%20of%20America%20First/U.S.A.%20First%20NDC%20Submission.pdf> [<https://perma.cc/PPB7-B2AX>]; United States, UNFCCC: NDC Registry (Interim), at <https://www4.unfccc.int/sites/NDCStaging/Pages/Party.aspx?party=USA> [<https://perma.cc/6V7P-YZPV>].

<sup>10</sup> Remarks Announcing United States Withdrawal from the United Nations Framework Convention on Climate Change Paris Agreement, 2017 DAILY COMP. PRES. DOC. 1 (June 1) [hereinafter Trump Statement of June 2017]. For discussion of the 2017 announcement of withdrawal, see generally Kristina Daugirdas & Julian Davis Mortenson, *Contemporary Practice of the United States*, 111 AJIL 1014, 1036–44 (2017).

nonbinding Paris accord and the draconian financial and economic burdens the agreement imposes on our country.”<sup>11</sup> Since Article 28(1) of the Paris Agreement prevents parties from giving formal notice of withdrawal until three years after the Agreement’s entry into force, the earliest possible date for such notice was November 4, 2019.<sup>12</sup>

On November 4, 2019, the United States formally notified the United Nations that it would be withdrawing from the Paris Agreement.<sup>13</sup> Secretary of State Michael Pompeo explained that the United States was withdrawing

because of the unfair economic burden imposed on American workers, businesses, and taxpayers by U.S. pledges made under the Agreement. The United States has reduced all types of emissions, even as we grow our economy and ensure our citizens’ access to affordable energy. . . .

The U.S. approach incorporates the reality of the global energy mix and uses all energy sources and technologies cleanly and efficiently, including fossils fuels, nuclear energy, and renewable energy. In international climate discussions, we will continue to offer a realistic and pragmatic model—backed by a record of real world results—showing innovation and open markets lead to greater prosperity, fewer emissions, and more secure sources of energy.<sup>14</sup>

Consistent with the terms of the Paris Agreement, the withdrawal will take effect on November 4, 2020, one year after the date of notice of withdrawal.<sup>15</sup> As a matter of international law, the United States could rejoin the Paris Agreement at any point thereafter, following a thirty-day waiting period.<sup>16</sup> The United States remains a party to the United Nations Framework Convention on Climate Change.<sup>17</sup>

The U.S. notification of withdrawal was met with international regret. China and France issued a joint declaration “reaffirm[ing] their strong support for the Paris Agreement, which they consider an irreversible process and a compass for strong action on the climate,”<sup>18</sup> and

<sup>11</sup> Trump Statement of June 2017, *supra* note 10, at 2.

<sup>12</sup> Paris Agreement, *supra* note 1, Art. 28(1); see Paris Agreement Depository Notification, Entry into Force, *supra* note 4 (noting the Paris Agreement’s entry into force on November 4, 2016).

<sup>13</sup> Depository Notification, Sec’y-Gen. of UN, Paris Agreement, Paris, Dec. 12, 2015, United States of America: Withdrawal (Nov. 4, 2019), available at <https://treaties.un.org/doc/Publication/CN/2019/CN.575.2019-Eng.pdf> [hereinafter Paris Agreement Depository Notification, U.S. Withdrawal].

<sup>14</sup> U.S. State Dep’t Press Release, Michael R. Pompeo, Sec’y of State, On the U.S. Withdrawal from the Paris Agreement (Nov. 4, 2019), available at <https://www.state.gov/on-the-u-s-withdrawal-from-the-paris-agreement> [<https://perma.cc/B9TP-B294>].

<sup>15</sup> Paris Agreement Depository Notification, U.S. Withdrawal, *supra* note 13; see also Paris Agreement, *supra* note 1, Art. 28(2) (noting the one-year waiting period after the formal notification of withdrawal).

<sup>16</sup> See Paris Agreement, *supra* note 1, Art. 21(3) (providing that nations can continue to join the Paris Agreement after its initial entry into force and that, for such a nation, “this Agreement shall enter into force on the thirtieth day after the date of deposit . . . of [that nation’s] instrument of ratification, acceptance, approval, or accession”).

<sup>17</sup> United Nations Framework Convention on Climate Change, 1771 UNTS 707 (May 9, 1992), at [https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=IND&mtdsg\\_no=XXVII-7&chapter=27&Temp=mtdsg3&clang=en](https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=IND&mtdsg_no=XXVII-7&chapter=27&Temp=mtdsg3&clang=en) [<https://perma.cc/L927-SJUC>].

<sup>18</sup> *China, France Reaffirm Support of Paris Climate Agreement, Call It “Irreversible,”* REUTERS (Nov. 6, 2019), at <https://www.reuters.com/article/us-china-france-paris-agreement/china-france-reaffirm-support-of-paris-climate-agreement-call-it-irreversible-idUSKBN1XG0QJ>; *Accord Appel de Pékin sur la Conservation de la Biodiversité et le Changement Climatique*, ÉLYSÉE (Nov. 6, 2019), at <https://www.elysee.fr/emmanuel-macron/2019/11/06/>

some other countries similarly emphasized their continued commitment to the Paris Agreement.<sup>19</sup> Likewise, the European Commission reiterated that the Paris Agreement “is here to stay, its door remains open and we hope the U.S. will decide to pass it again one day.”<sup>20</sup> The spokesperson for the United Nations secretary-general stated that “our determination to move forward on the implementation of the Paris Agreement remains unchanged” and “encourage[d] member states to actively engage . . . to raise ambition, to tackle and defeat climate change.”<sup>21</sup>

Domestically, the U.S. notification of withdrawal highlighted the strong divergence between the U.S. government and numerous subnational governments with respect to the issue of climate. Immediately after the U.S. notification, a bipartisan coalition of twenty-five state governors “reaffirm[ed] our commitment to supporting climate action and . . . strongly oppos[ed] the Administration’s decision to formally withdraw from the Paris Agreement.”<sup>22</sup> They noted that since June 2017, “our states have adopted or strengthened 29 greenhouse gas reduction targets and ramped up zero-carbon power generation, with 19 states now enacting or pursuing goals for 100 percent carbon-free or clean power by 2030 or later.”<sup>23</sup> In this same time period, a sizeable number of states and major cities have challenged the Trump administration’s domestic climate actions, including by filing lawsuits contesting its rollback of the Clean Power Plan<sup>24</sup> and energy-efficiency standards.<sup>25</sup>

California has been a leader in these subnational attempts to address climate change and has consequently itself faced resistance from the Trump administration. In September 2019, the Trump administration revoked California’s authority to set stricter vehicle emissions

appel-de-pekin-sur-la-conservation-de-la-biodiversite-et-le-changement-climatique [https://perma.cc/D85B-EGNN]; see also Chinese Foreign Ministry Press Release, Chinese Foreign Ministry Spokesperson Geng Shuang’s Regular Press Conference on November 5, 2019 (Nov. 5, 2019), at https://www.fmprc.gov.cn/mfa\_eng/xwfw\_665399/s2510\_665401/t1713475.shtml [https://perma.cc/GKB6-NSHP] (“China regrets that the US began the process to withdraw from the Paris Agreement . . . We support the Paris Agreement, actively fulfill our international obligations that are consistent with our development stage and national condition, and take policy actions on climate change.”).

<sup>19</sup> See, e.g., *EU Hopes US Will Rethink Choice to Pull out of Climate Pact*, AP NEWS (Nov. 5, 2019), at https://apnews.com/f81a25b839324e578641946c358c22ec (quoting German Environment Minister Svenja Schulze as calling the U.S. withdrawal “regrettable” and noting that “[t]he rest of the world stands together on climate protection”); Rossella Tercatin, *Israel Reaffirms Its Commitment to Paris Agreement*, JERUSALEM POST (Nov. 6, 2019), at https://www.jpost.com/Israel-News/Israel-reaffirms-its-commitment-to-Paris-Agreement-607032 (quoting Israeli Environmental Protection Minister Zeev Elkin as saying, “The decision made by the United States to withdraw from the Paris Agreement will not lead us to withdraw from it as well”).

<sup>20</sup> European Commission (@EU\_Commission), TWITTER (Nov. 5, 2019, 5:32 AM), at https://twitter.com/EU\_Commission/status/1191709918094598145?s=20 [https://perma.cc/B5WX-XLMC].

<sup>21</sup> UN/US Paris Agreement Reax, UN Audiovisual Library (Nov. 5, 2019), at https://www.unmultimedia.org/avlibrary/asset/2494/2494475/ [https://perma.cc/78QW-QSAB].

<sup>22</sup> U.S. Climate All. Press Release, U.S. Climate Alliance Governors Oppose Administration’s Withdrawal from the Paris Agreement (Nov. 4, 2019), at http://www.usclimatealliance.org/publications/pariswithdrawal [http://perma.cc/M2V9-59QV].

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

<sup>24</sup> Petition for Review, *New York v. EPA*, No. 19-1019 (D.C. Cir. Aug. 13, 2019), available at https://oag.ca.gov/system/files/attachments/press-docs/2019%2008%2013%20final%20petition%20for%20review.pdf.

<sup>25</sup> Petition for Review, *New York v. U.S. Dep’t of Energy*, No. 19-\_\_\_\_ (2d Cir. Nov. 4, 2019), available at https://ag.ny.gov/sites/default/files/2019\_11\_04\_petition\_for\_review\_gsl\_definition\_rule\_withdrawal\_final.pdf.

standards than those established under federal law,<sup>26</sup> leading California—along with twenty-two other states, the District of Columbia, and two cities—to sue the administration over this revocation.<sup>27</sup> In the latest salvo, on October 23, 2019, the United States filed a lawsuit against California, alleging that the cap-and-trade agreement between California and Quebec, Canada, is unconstitutional.<sup>28</sup> This agreement “link[s]” California and Quebec’s pre-existing cap-and-trade programs<sup>29</sup> by allowing regulated entities in California and Quebec to trade their emissions allowances with each other.<sup>30</sup> In challenging this agreement, the United States alleges that it is “an independent foreign policy in the area of greenhouse gas regulation” which “intrude[s] into the federal sphere,” “complexif[y]ing] and burden[ing] the United States’ task . . . of negotiating competitive international agreements.”<sup>31</sup> In response, the governor of California described this lawsuit as a “political vendetta against California, our climate policies and the health of our communities,” adding that “the Trump administration’s abysmal record of denying climate change and propping up big polluters makes cross-border collaboration all the more necessary.”<sup>32</sup> The case is pending before a federal district judge in the Eastern District of California.<sup>33</sup>

<sup>26</sup> See generally *The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule Part One: One National Program*, 84 Fed. Reg. 51,310 (Sept. 27, 2019).

<sup>27</sup> Complaint, *California v. Chao*, No. 19-02826 (D.D.C. Sept. 20, 2019), available at [https://oag.ca.gov/system/files/attachments/press\\_releases/California%20v.%20Chao%20complaint%20%2800000002%29.pdf](https://oag.ca.gov/system/files/attachments/press_releases/California%20v.%20Chao%20complaint%20%2800000002%29.pdf) [<https://perma.cc/7FG2-YRVJ>].

<sup>28</sup> Complaint, *United States v. California*, No. 19-2142 (E.D. Cal. Oct. 23, 2019), available at <https://www.justice.gov/opa/press-release/file/1212416/download> [<https://perma.cc/M3TW-RQGZ>] [hereinafter *Complaint*]; see also Amended Complaint, *United States v. California*, No. 19-2142 (E.D. Cal. Nov. 19, 2019).

<sup>29</sup> Cal. Air Res. Bd., *Linkage*, at <https://ww3.arb.ca.gov/cc/capandtrade/linkage/linkage.htm> [[perma.cc/JKN3-UG6G](https://perma.cc/JKN3-UG6G)].

<sup>30</sup> Cal. Air Res. Bd., Agreement on the Harmonization and Integration of Cap-and-Trade Programs for Reducing Greenhouse Gas Emissions, Art. 7, available at [https://ww3.arb.ca.gov/cc/capandtrade/linkage/2017\\_linkage\\_agreement\\_ca-qc-on.pdf](https://ww3.arb.ca.gov/cc/capandtrade/linkage/2017_linkage_agreement_ca-qc-on.pdf) [<https://perma.cc/QJC4-N5ZR>]. This agreement was made in 2017, updating an earlier one from 2013. See Cal. Air Res. Bd., Agreement Between the California Air Resources Board and the Gouvernement du Québec Concerning the Harmonization and Integration of Cap-and-Trade Programs for Reducing Greenhouse Gas Emissions, available at [https://ww3.arb.ca.gov/cc/capandtrade/linkage/ca\\_quebec\\_linking\\_agreement\\_english.pdf](https://ww3.arb.ca.gov/cc/capandtrade/linkage/ca_quebec_linking_agreement_english.pdf) [<https://perma.cc/72LK-E584>].

<sup>31</sup> Complaint, *supra* note 28, para. 3.

<sup>32</sup> Governor of Cal. Press Release, Governor Newsom Statement on Trump Administration’s Attack on California’s Landmark Cap-and-Trade Program (Oct. 23, 2019), at <https://www.gov.ca.gov/2019/10/23/governor-newsom-statement-on-trump-administrations-attack-on-californias-landmark-cap-and-trade-program> [<https://perma.cc/9FBY-CCTN>].

<sup>33</sup> See Stipulation and [Proposed] Order Extending Time for Defendants to Respond to Complaint or Amended Complaint, *United States v. California*, No. 19-2142 (E.D. Cal. Nov. 19, 2019) (requesting, with the joint agreement of the parties, that California have until January 6, 2020, to file an answer or a motion to dismiss).

## INTERNATIONAL ECONOMIC LAW

*Trump Administration Continues Trade Negotiations with Major Trade Partners*

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In the fall of 2019, the Trump administration reached several trade arrangements, some of them tentative, with important U.S. trade partners. On October 11, 2019, China and the United States announced a preliminary trade deal subject to finalization—one that came after more than a year of escalating tariffs. Just a week earlier, the United States had signed two trade agreements with Japan, one regarding tariff reductions and the other regarding digital trade. None of these deals appear to require subsequent congressional approval in the eyes of the executive branch, unlike the earlier United States-Mexico-Canada Agreement (USMCA), which was signed in November 2018 and whose fate in Congress appears promising as of mid-December of 2019. In addition to these trade arrangements, the fall of 2019 saw several developments in trade relations between the United States and the European Union tied to the long-running trade disputes.

In March of 2018, the U.S. Office of the Trade Representative (USTR) issued a report concluding that China was engaged in certain unfair trade practices.<sup>1</sup> Over the next year and a half, the two countries engaged in dizzying exchanges of tariffs and counter-tariffs. Continuing this trend in early August of 2019, the Trump administration announced that an additional 10 percent tariff on \$300 billion of goods would go into effect on September 1 and December 15, 2019.<sup>2</sup> In response, China announced it would raise tariffs on various products, including soybeans, pork, and corn.<sup>3</sup> Soon after, President Trump tweeted that American companies should “immediately start looking for an alternative to China, including bringing . . . [their] companies HOME and making [their] products in the USA.”<sup>4</sup> The same day, the Trump administration announced that it would increase the tariffs that were planned

<sup>1</sup> OFFICE OF THE U.S. TRADE REP., FINDINGS OF THE INVESTIGATION INTO CHINA’S ACTS, POLICIES, AND PRACTICES RELATED TO TECHNOLOGY TRANSFER, INTELLECTUAL PROPERTY, AND INNOVATION UNDER SECTION 301 OF THE TRADE ACT OF 1974 (2018). For discussion of this investigation, its aftermath, and the legal landscape underlying subsequent tariffs, see Jean Galbraith, *Contemporary Practice of the United States*, 112 AJIL 505 (2018); Jean Galbraith, *Contemporary Practice of the United States*, 112 AJIL 751 (2018).

<sup>2</sup> See Office of the U.S. Trade Rep. Press Release, USTR Announces Next Steps on Proposed 10 Percent Tariff on Imports from China (Aug. 13, 2019), at <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2019/august/ustr-announces-next-steps-proposed> [<https://perma.cc/B99V-27EY>]; see also Jean Galbraith, *Contemporary Practice of the United States*, 113 AJIL 822, 830 (2019).

<sup>3</sup> See Alan Rappeport & Keith Bradsher, *Trump Says He Will Raise Existing Tariffs on Chinese Goods to 30%*, N.Y. TIMES (Aug. 23, 2019), at <https://www.nytimes.com/2019/08/23/business/china-tariffs-trump.html?module=inline>.

<sup>4</sup> Donald J. Trump (@realDonaldTrump), TWITTER (Aug. 23, 2019, 7:59 AM), at <https://twitter.com/realDonaldTrump/status/1164914960046133249> [<https://perma.cc/H643-NNVR>]. Trump declared that he would have the power to prohibit U.S. companies from continuing business in China pursuant to the International Emergency Economic Powers Act (IEEPA). Donald J. Trump (@realDonaldTrump), TWITTER (Aug. 23, 2019, 8:58 PM), at <https://twitter.com/realDonaldTrump/status/1165111122510237696> [<https://perma.cc/2L87-TCTQ>]; but see Joshua Geltzer, *Blame Trump, Not the U.S. Code, for His Abuse of Emergency Authority*, JUST SECURITY (Aug. 26, 2019), at <https://www.justsecurity.org/65978/blame-trump-not-the-u-s-code-for-his-abuse-of-emergency-authority> (arguing that if “Trump in fact invokes the IEEPA to restrict American commercial activity in China, he’ll be . . . violating federal law” and expressing the hope that courts would “reject Trump’s overreach”).

to take effect in September and December by 5 percent, as well as increasing another, preexisting set of tariffs by 5 percent on October 1.<sup>5</sup>

In September, however, signs of a thaw emerged. Pending high-level negotiations, China eliminated a small number of U.S. products from being subject to its tariffs, while Trump authorized a two-week delay of the 5 percent tariff increase that was supposed to go into effect on October 1 “as a gesture of good will.”<sup>6</sup>

On October 11, 2019, President Trump announced that a “phase one” deal had been reached with China, “subject to getting written” at a later date.<sup>7</sup> As announced at that time, the deal included commitments by China to purchase \$40 to \$50 billion of U.S. agricultural products annually, to make its markets more accessible to U.S. financial firms, and to have greater foreign exchange market transparency.<sup>8</sup> During the announcement, Trump and his advisors noted that the United States would further delay the implementation of the October tariff increases, although they were not clear about whether the tariffs planned for December would continue as scheduled.<sup>9</sup>

Further negotiations ensued and, on December 13, 2019, the United States and China stated that they had finalized their agreement.<sup>10</sup> According to news reports, China committed to a sizeable increase in its purchase of agricultural products.<sup>11</sup> The United States agreed to cut the tariffs imposed in September 2019 down to 7.5% and to cancel the December tariffs. As of mid-December of 2019, the text of the agreement has not been released and was reportedly awaiting final refinement.<sup>12</sup>

Trump has stated that this deal will be one which does not require the subsequent approval of Congress as a matter of U.S. domestic law,<sup>13</sup> perhaps because the main U.S. concession will

<sup>5</sup> Office of the U.S. Trade Rep. Press Release, USTR Statement on Section 301 Tariff Action Regarding China (Aug. 23, 2019), at <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2019/august/ustr-statement-section-301-tariff> [<https://perma.cc/PSE2-7URS>].

<sup>6</sup> See Alexandra Stevenson, *China Lifts Tariffs on Some U.S. Goods in Modest Olive Branch to Trump*, N.Y. TIMES (Sept. 11, 2019), at <https://www.nytimes.com/2019/09/11/business/china-drops-tariffs.html?module=inline> (reporting that China “publish[ed] a short list of products to be spared from retaliatory tariffs on American-made goods”); Donald J. Trump (@realDonaldTrump), TWITTER (Sept. 11, 2019, 4:17 PM), at <https://twitter.com/realDonaldTrump/status/1171925717988388865> [<https://perma.cc/34KF-3CTP>].

<sup>7</sup> Donald J. Trump, Remarks in a Meeting with Vice Premier Liu He of China and an Exchange with Reporters, 2019 DAILY COMP. PRES. DOC. NO. 713, at 1 (Oct. 11) [hereinafter Trump and Liu Joint Statement]. With respect to enforcement, Trump stated that there would be an enforcement provision and U.S. Trade Representative Robert E. Lighthizer noted that there would be “a very elaborate consultation process.” *Id.* at 5.

<sup>8</sup> See *id.* at 2, 11 (also quoting Secretary of the Treasury Mnuchin as saying with respect to the U.S. agricultural exports that these would “scale up to an annual figure” of \$40 to \$50 billion within two years). This would be a large increase compared to current exports. See Office of the U.S. Trade Rep., *The People’s Republic of China*, at <https://ustr.gov/countries-regions/china-mongolia-taiwan/peoples-republic-china> [<https://perma.cc/T956-2TUZ>] (“U.S. total exports of agricultural products to China totaled \$9.3 billion in 2018.”).

<sup>9</sup> Trump and Liu Joint Statement, *supra* note 7, at 7. The September 1 tariffs had already gone into effect, and the Trump administration made no statement about withdrawing those tariffs. See *generally id.* (lacking any mention of the September 1 tariffs); 84 Fed. Reg. 57145 (Oct. 24, 2019) (noting the tariffs originally noticed on August 20, 2019 were “effective September 1, 2019”).

<sup>10</sup> Alan Rappeport, Ana Swanson, Keith Bradsher & Chris Buckley, *U.S. and China Reach Initial Trade Deal*, N.Y. TIMES (Dec. 13, 2019), at <https://www.nytimes.com/2019/12/13/business/economy/china-trade-deal.html>.

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

<sup>12</sup> *Id.* (observing that the text “still needs to be translated, scrubbed and signed”).

<sup>13</sup> Donald J. Trump (@realDonaldTrump), TWITTER (Oct. 11, 2019, 7:15 AM), at <https://twitter.com/realDonaldTrump/status/1182661081849835520> [<https://perma.cc/6T4R-ZT55>] (“One of the great things



be the rollback of tariffs, which the executive branch has the authority to undertake under preexisting congressional law.<sup>14</sup> Trump has stated that after the completion of “phase one,” the United States and China will turn to “phase two” and negotiate further with respect to intellectual property, technology transfers, and possibly other issues.<sup>15</sup>

Shortly before the October announcement of the “phase one” deal with China, the United States signed two trade agreements with Japan. Early in the Trump administration, trade talks between the United States and Japan had been at a standstill following President Trump’s 2017 decision that the United States would not become a party to the Trans-Pacific Partnership (TPP).<sup>16</sup> In the fall of 2018, however, Japan agreed to begin negotiations on a new bilateral trade agreement, and the Trump administration notified Congress of the start of these negotiations.<sup>17</sup> During the G-7 summit in France in August of 2019, Trump declared that the two countries were “fairly close” to completing “a major deal.”<sup>18</sup> Several weeks later, on September 16, Trump relayed to Congress his intention to enter into two agreements with Japan: an “initial trade agreement” concerning tariffs and an “Executive Agreement” concerning digital trade.<sup>19</sup> These agreements were finalized on September 25 and signed on October 7.<sup>20</sup>

The agreement on tariffs provides that both parties will lower certain tariffs over time. A USTR press release states that “[o]nce this agreement is implemented, over 90 percent of U.S. food and agricultural products imported into Japan will either be duty free or receive preferential tariff access.”<sup>21</sup> In exchange, the United States has agreed to eliminate or reduce tariffs for agricultural products “such as certain perennial plants and cut flowers, persimmons, green tea, chewing gum, and soy sauce,” as well as a number of industrial goods including

about the China Deal is the fact that, for various reasons, we do not have to go through the very long and politically complex Congressional Approval Process”).

<sup>14</sup> See Kevin Breuninger, *Trump Says the US Has Come to a Substantial Phase One Deal with China*, CNBC (Oct. 11, 2019), at <https://www.cnbc.com/2019/10/11/trump-says-us-has-come-to-a-substantial-phase-one-deal-with-china.html> (quoting a commentator offering reasoning along these lines).

<sup>15</sup> Trump and Liu Joint Statement, *supra* note 7, at 2.

<sup>16</sup> See Motoko Rich, *Japan’s Embrace of Bilateral Trade Talks with U.S. Spares It from Tariffs*, N.Y. TIMES (Sept. 27, 2018), at <https://www.nytimes.com/2018/09/27/world/asia/japan-trump-trade-talks-auto-tariffs.html>.

<sup>17</sup> See White House Press Release, President Donald J. Trump Is Strengthening Ties, Improving Trade, and Deepening Our Global Partnership with Japan (Apr. 26, 2019), at <https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-strengthening-ties-improving-trade-deepening-global-partnership-japan> [<https://perma.cc/BH8Z-QZFH>]; Letters from Robert E. Lighthizer, U.S. Trade Representative, to Charles E. Schumer, U.S. Senate Minority Leader, et al. (Oct. 16, 2018), available at <https://ustr.gov/sites/default/files/20181017004828790-1.pdf> [<https://perma.cc/PZC3-8HV6>].

<sup>18</sup> Donald J. Trump, Remarks Prior to a Meeting with Prime Minister Shinzo Abe of Japan and an Exchange with Reporters in Biarritz, France, 2019 DAILY COMP. PRES. DOC. NO. 570, at 2 (Aug. 25).

<sup>19</sup> See Donald J. Trump, Message to the Congress on Notification of Initiation of the United States-Japan Trade Agreement, 2019 DAILY COMP. PRES. DOC. NO. 623, at 1 (Sept. 16) (noting the administration was “pursuing negotiations with Japan in stages” in order to “achieve a comprehensive trade agreement”).

<sup>20</sup> Donald J. Trump, Remarks Prior to a Meeting with Prime Minister Shinzo Abe of Japan in New York City, 2019 DAILY COMP. PRES. DOC. NO. 660, at 1 (Sept. 25) [hereinafter Trump and Abe Joint Statement]; Office of the U.S. Trade Rep., *U.S.-Japan Trade Agreement Text*, at <https://ustr.gov/countries-regions/japan-korea-apec/japan/us-japan-trade-agreement-negotiations/us-japan-trade-agreement-text> [<https://perma.cc/2QQH-DE9K>]; Office of the U.S. Trade Rep., *U.S.-Japan Trade Agreement Text*, at <https://ustr.gov/countries-regions/japan-korea-apec/japan/us-japan-trade-agreement-negotiations/us-japan-digital-trade-agreement-text> [<https://perma.cc/YVM6-LJHB>].

<sup>21</sup> Office of the U.S. Trade Rep. Press Release, Fact Sheet on U.S.-Japan Trade Agreement (Oct. 7, 2019), at <https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/2019/september/fact-sheet-us-japan-trade-agreement> [<https://perma.cc/A79Q-2YUJ>].

“machine tools, fasteners, steam turbines, bicycles, bicycle parts, and musical instruments.”<sup>22</sup> The digital trade agreement, which the USTR described as “meet[ing] the gold standard on digital trade rules set by the USMCA,” includes a host of provisions, including “barrier-free cross-border data transfers,” and prohibitions “on imposing customs duties on digital products transmitted electronically such as videos, music, e-books, software, and games.”<sup>23</sup> The terms of both agreements have considerable but not complete similarity to a subset of provisions from the earlier TPP.<sup>24</sup>

By having two separate trade agreements, rather than a combined one, the Trump administration was able to invoke statutory authority for one of the agreements. Section 103(a) of the Bipartisan Congressional Trade Priorities and Accountability Act of 2015 authorizes the president to “enter into trade agreements with foreign countries” where these agreements are limited to certain adjustments to tariffs.<sup>25</sup> Trump invoked this section by name in notifying Congress of his intent to enter into the agreement on tariffs with Japan.<sup>26</sup> With respect to the digital trade agreement, the Trump administration’s notification to Congress did not specify any statutory authority authorizing this agreement, instead simply describing it as an “Executive Agreement.”<sup>27</sup> In past administrations, the USTR and other executive branch actors have taken the position that certain internationally legally binding trade agreements do not require congressional approval.<sup>28</sup> The assumption as of fall 2019 is that both agreements with Japan will enter into force on January 1, 2020.<sup>29</sup>

Trump characterized the agreement on tariffs as “a tremendous trade deal” and remarked that negotiations for “phase two” are already underway.<sup>30</sup> The next phase will likely relate to U.S. imports of Japanese automobiles, the further entry of U.S. service providers into the Japanese markets, and the regulation of currency exchange rates.<sup>31</sup> At least pending the

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

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

<sup>24</sup> *See id.*; *U.S.-Japan Trade Agreement a “Cheap Imitation” of TPP: Sen. Carper*, BLOOMBERG (Sept. 26, 2019), at <https://www.bloomberg.com/news/videos/2019-09-26/u-s-japan-trade-agreement-a-cheap-imitation-of-tpp-sen-carper-video> (quoting a Democratic senator to the effect that the negotiations had resulted in a “cheap imitation” of the TPP); David Lawder, *U.S.-Japan Trade Deal Versus TPP: Where It Falls Short, Where It Exceeds*, REUTERS (Oct. 7, 2019), at <https://www.reuters.com/article/us-usa-trade-japan/u-s-japan-trade-deal-versus-tpp-where-it-falls-short-where-it-exceeds-idUSKBN1WM0A3> (noting various similarities while observing that the TPP provided for broader tariff reduction but less comprehensive commitments with respect to digital trade).

<sup>25</sup> Bipartisan Congressional Trade Priorities and Accountability Act of 2015, Pub. L. No. 114-26, § 103(a), 129 Stat. 320, 333 (setting forth an authorization that will sunset and thus not apply to agreements reached after July 1, 2021).

<sup>26</sup> Message to the Congress on Notification of Initiation of the United States-Japan Trade Agreement, *supra* note 19.

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

<sup>28</sup> *See* Jean Galbraith, *International Law and the Domestic Separation of Powers*, 99 VA. L. REV. 987, 1037–42 (2013) (describing how, during the first term of the Obama administration, executive branch officials concluded that congressional approval was not needed for the United States to join the Anti-Counterfeiting Trade Agreement, although this position was disputed by some scholars and members of Congress).

<sup>29</sup> CONG. RESEARCH SERV., IF11120, U.S.-JAPAN TRADE AGREEMENT NEGOTIATIONS 1 (2019). Japan’s Diet approved both agreements towards the end of 2019. *See* Office of the U.S. Trade Rep. Press Release, Ambassador Lighthizer Lauds Japan’s Approval of the U.S.-Japan Digital Trade Agreement (Dec. 4, 2019), at <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2019/december/ambassador-lighthizer-lauds-japan> [<https://perma.cc/8479-R8DY>].

<sup>30</sup> Trump and Abe Joint Statement, *supra* note 20, at 1.

<sup>31</sup> *See* Ana Swanson, *Trump Announces a Trade Pact with Japan*, N.Y. TIMES (Sept. 25, 2019), at <https://www.nytimes.com/2019/09/25/business/trump-announces-limited-trade-pact-with-japan.html> (“[A Japanese chief

completion of this second phase, some have “question[ed] the extent to which [the initial agreement on tariffs] adheres to Article XXIV of the General Agreement on Tariffs and Trade (GATT) under the [World Trade Organization (WTO)] that requires [Free Trade Agreements] cover ‘substantially all trade,’ in particular given the exclusion of auto trade.”<sup>32</sup>

In seeking to structure the trade deals with China and Japan so as to bypass the need for subsequent congressional approval, the Trump administration is likely conscious of its experience seeking congressional approval for the USMCA. This renegotiation of the North American Free Trade Agreement (NAFTA) was signed on November 30, 2018.<sup>33</sup> By the end of November of 2019, however, only Mexico had received the legislative approval necessary to effectuate it.<sup>34</sup> In the United States, the fate of the USMCA in Congress appeared uncertain throughout the fall of 2019. On May 30, 2019, the USTR submitted “a draft Statement of Administrative Action (SAA) to implement the [USMCA] and a copy of the final legal text as it now stands.”<sup>35</sup> On December 13, 2019, the implementing legislation itself was submitted for congressional consideration, triggering a fast-track process for an up-or-down vote.<sup>36</sup>

Before triggering this process, the Trump administration had undertaken negotiations with Congress—and particularly with the Democrat-controlled House of Representatives—in order to increase the likelihood that the USMCA will be approved. This also required re-opening certain issues with Canada and Mexico. In a major breakthrough in these negotiations in early December of 2019, the Speaker of the House Nancy Pelosi announced support for a modified version of the USMCA, one whose changes strengthened compliance mechanisms for the labor and environmental provisions, while reducing intellectual property protections for certain kinds of pharmaceuticals.<sup>37</sup> Immediately afterward, lead negotiators for Canada, Mexico, and the United States signed a revised version of the USMCA incorporating these changes.<sup>38</sup> On

negotiator, Atsuyuki] Oike added . . . that the two sides would discuss a reduction in the United States’ 2.5 percent tariff on imported passenger cars in their next round of talks.”); CONG. RESEARCH SERV., *supra* note 29, at 2 (listing “Motor Vehicles,” “Services,” and “Currency” as “Potential Provisions in Future Talks”).

<sup>32</sup> CONG. RESEARCH SERV., *supra* note 29, at 2 (noting that while “adherence to Article XXIV has rarely been challenged at the WTO, whether or not the U.S.-Japan deal violates the letter or spirit of this WTO requirement likely depends on the timeline and scope of the next stage talks”).

<sup>33</sup> See Protocol Replacing the North American Free Trade Agreement with the Agreement Between the United States of America, the United Mexican States, and Canada, *available at* [https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/Text/USMCA\\_Protocol.pdf](https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/Text/USMCA_Protocol.pdf). For a detailed discussion of the notable differences between NAFTA and USMCA, see Jean Galbraith, *Contemporary Practice of the United States*, 113 AJIL 150 (2019).

<sup>34</sup> On June 19, 2019, Mexico overwhelmingly approved the USMCA. See *LXIV Legislatura: Periodo Extraordinario Primer Año de Ejercicio*, SENADO DE LA REPÚBLICA, *at* <http://www.senado.gob.mx/64/votacion/3417> [<https://perma.cc/V8J9-K8PY>] (showing a Senate vote of 114 to 4 in favor of the trade agreement). Although the Canadian Parliament began its process in May, it was dissolved prior to completing this process and, as a result, its implementation act must be reintroduced in the next parliamentary session.

<sup>35</sup> Message from U.S. Trade Representative Robert E. Lighthizer to Speaker of the House Nancy Pelosi, at 1 (May 30, 2019). This submission must be made to Congress at least thirty days before submitting an implementing bill. 19 U.S.C. § 4205(a)(1)(D)–(E).

<sup>36</sup> *White House Sends USMCA Implementing Bill to Congress*, INSIDE U.S. TRADE (Dec. 13, 2019), *at* <https://insidetrade.com/daily-news/white-house-sends-usmca-implementing-bill-congress>.

<sup>37</sup> See Speaker of the House Press Release, Transcript of Speaker Pelosi Press Conference Announcing New USMCA Agreement (Dec. 10, 2019), *at* <https://www.speaker.gov/newsroom/121019-2>.

<sup>38</sup> Natalie Andrews & William Mauldin, *Revised Trade Pact Set for Likely Approval by Congress in 2020*, WALL ST. J. (Dec. 10, 2019), *at* <https://www.wsj.com/articles/house-democrats-reach-agreement-with-trump-administration-on-usmca-trade-deal-11575989670>.

December 19, 2019, this implementing legislation passed the House of Representatives by a vote of 385–41, and its prospects of passing the Senate in early 2020 are promising.<sup>39</sup>

In contrast to the indications of progress with respect to trade deals with China, Japan, Mexico, and Canada, trade relations between the United States and the European Union saw mixed developments during the fall of 2019. On August 2, 2019, the United States and the European Union did sign an agreement that increased the quantity of hormone-free U.S. beef that could be exported duty-free to the European Union.<sup>40</sup> In contrast, another ongoing dispute escalated—this one over countermeasures in response to unlawful subsidies to aircraft manufacturers. On October 18, 2019, after getting approval from the World Trade Organization, the United States imposed tariffs on \$7.5 billion worth of European goods as a countermeasure for EU subsidies to Airbus.<sup>41</sup> The United States undertook this step notwithstanding the fact that it has been found in violation of international trade law with respect to U.S. subsidies to Boeing and that, before too long, the WTO will presumably also authorize the EU to impose major tariffs as countermeasures.<sup>42</sup> In response, EU Commissioner for Trade Cecilia Malmström characterized the U.S. tariffs as “short-sighted and counterproductive” and declared that, upon WTO authorization, the European Union would “have no other option” in the absence of a settlement other than to respond with tariffs.<sup>43</sup>

<sup>39</sup> Emily Cochrane & Ana Swanson, *Revised North American Trade Pact Passes House*, N.Y. TIMES (Dec. 19, 2019), at <https://www.nytimes.com/2019/12/19/us/politics/usmca-deal.html>.

<sup>40</sup> Office of the U.S. Trade Rep. Press Release, *United States and European Union Sign Breakthrough Agreement on U.S. Beef Access to EU* (Aug. 28, 2019), at <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2019/august/united-states-and-european-union> [<https://perma.cc/V4GA-QULB>]; *The European Union and the United States Sign an Agreement on Imports of Hormone-Free Beef*, EUROPEAN COMMISSION, at [https://ec.europa.eu/commission/presscorner/detail/en/IP\\_19\\_5010](https://ec.europa.eu/commission/presscorner/detail/en/IP_19_5010) [<https://perma.cc/WTT4-E79Y>] (also noting the need for future approval from the European Parliament).

<sup>41</sup> European Commission Press Release, *Statement by Commissioner for Trade Cecilia Malmström on U.S. Countermeasures in Airbus Dispute*, at <https://trade.ec.europa.eu/doclib/press/index.cfm?id=2075> [<https://perma.cc/U7XN-HWWB>]; James McAuley, *Trump’s Proposed Cheese and Wine Tariffs Rile Europeans*, WASH. POST (Oct. 3, 2019), at [https://www.washingtonpost.com/world/europe-decries-proposed-us-tariffs-on-french-wine-italian-cheese-and-other-products/2019/10/03/2dab6dd9-89fb-403c-8f1d-77edd5cd29db\\_story.html](https://www.washingtonpost.com/world/europe-decries-proposed-us-tariffs-on-french-wine-italian-cheese-and-other-products/2019/10/03/2dab6dd9-89fb-403c-8f1d-77edd5cd29db_story.html); see also *Recourse to Article 22.5 of the DSU by the European Union: Decision by the Arbitrator, European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft*, WTO Doc. WT/DS316/ARB (finding the European Union had broken certain global trade rules by providing subsidies to Airbus, damaging the United States annually by approximately \$7.5 billion).

<sup>42</sup> See European Commission Press Release, *Statement on the Publication of WTO’s Award in the Airbus Dispute*, at <https://trade.ec.europa.eu/doclib/press/index.cfm?id=2068> [<https://perma.cc/RW7T-GUX5>]; European Commission Press Release, *EU Scores Final Victory in the WTO Boeing Dispute*, at <https://trade.ec.europa.eu/doclib/press/index.cfm?id=1999&title=EU-scores-final-victory-in-the-WTO-Boeing-dispute> [<https://perma.cc/4GP6-JBB7>].

<sup>43</sup> See *Statement on the Publication of the WTO’s Award in the Airbus Dispute*, *supra* note 42 (stating that “[o]ur readiness to find a fair settlement remains unchanged”); David J. Lynch, *U.S. Can Impose Tariffs on \$7.5 Billion in Goods Because E.U. Gave Illegal Subsidies to Airbus*, WTO Rules, WASH. POST (Oct. 2, 2019), at [https://www.washingtonpost.com/business/economy/the-united-states-can-impose-tariffs-on-75-billion-in-goods-because-european-union-gave-illegal-subsidies-to-airbus-wto-rules/2019/10/02/021edc06-e51d-11e9-b403-f738899982d2\\_story.html](https://www.washingtonpost.com/business/economy/the-united-states-can-impose-tariffs-on-75-billion-in-goods-because-european-union-gave-illegal-subsidies-to-airbus-wto-rules/2019/10/02/021edc06-e51d-11e9-b403-f738899982d2_story.html) (quoting a senior USTR official as saying the EU proposals were “not sufficient”).

## USE OF FORCE, ARMS CONTROL, AND NONPROLIFERATION

*United States Withdraws Troops from Syria, Leaving Kurds Vulnerable*

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Political instability and violence escalated in northeastern Syria in October 2019, following President Trump's decision to withdraw most U.S. troops from the country. Trump's decision left U.S.-backed Kurdish forces vulnerable to attacks by Turkey, intensifying an already dire humanitarian situation. Soon thereafter, Kurdish leaders negotiated an agreement with the Russian-backed Syrian government to fill the vacuum left by the U.S. withdrawal. By late October, the president of Turkey agreed to a ceasefire in response to diplomatic and economic pressure from the United States and to the arrival of Russian and Syrian troops into northeastern Syria. Shortly thereafter, U.S. forces carried out a raid in northwestern Syria that resulted in the death of the leader of the Islamic State of Iraq and the Levant (ISIL)—a raid that relied in part on intelligence gathered earlier by Kurdish allies.

Since 2016, American Special Operation troops have been on the ground fighting alongside the Syrian Democratic Forces, a Kurdish-led militia, in an effort to defeat ISIL.<sup>1</sup> On December 19, 2018, Trump abruptly announced that the United States would withdraw entirely from Syria in light of the territorial defeat of ISIL, but he scaled back this decision after receiving bipartisan criticism from Congress and significant opposition from executive branch officials.<sup>2</sup> In the months following this announcement, Turkish President Recep Tayyip Erdoğan repeatedly threatened that Turkey would launch military operations into Kurdish-controlled northeastern Syria.<sup>3</sup>

In August of 2019, the United States and Turkey moved forward with the creation of a “safe zone” in northeastern Syria. The American embassy in Turkey explained that they had agreed on:

- (a) the rapid implementation of initial measures to address Turkey's security concerns;
- (b) to stand-up a joint operations center in Turkey as soon as possible in order to coordinate and manage the establishment of the safe zone together;
- (c) that the safe zone shall become a peace corridor, and every effort shall be made so that displaced Syrians can return to their country.<sup>4</sup>

<sup>1</sup> See Jean Galbraith, *Contemporary Practice of the United States*, 113 AJIL 394, 395 (2019) (also noting that the United States first entered the conflict in Syria in 2014). The Obama administration asserted domestic legal authority for using force in Syria based on the 2001 and 2002 Authorizations for Use of Military Force and claimed an international right to use force to respond in self-defense under Article 51 of the United Nations Charter to threats posed by ISIL. *Id.* at 394.

<sup>2</sup> *Id.* at 397–99.

<sup>3</sup> Sarah Dadouch, *Turkey to Launch Offensive in Kurdish-Controlled Area in Northern Syria: Erdoğan*, REUTERS (Aug. 4, 2019), at <https://www.reuters.com/article/us-syria-security-turkey/turkey-to-launch-offensive-in-kurdish-controlled-area-in-northern-syria-erdogan-idUSKCN1UU0GS>. The Turkish government views Kurdish forces within Syria as closely connected with Kurdish separatists within Turkey, whom it considers terrorists. See 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://www.nytimes.com/2018/12/19/world/middleeast/syria-kurds-isis-us.html>.

<sup>4</sup> U.S. Mission Turkey, *Statement on Joint Military Talks Regarding Syria* (Aug. 7, 2019), at <https://tr.usembassy.gov/statement-on-joint-military-talks-regarding-syria> [<https://perma.cc/D654-AN5Z>].

In the following month, U.S. troops worked with the Syrian Democratic Forces to remove their trenches and other military barriers within the safe zone.<sup>5</sup>

Notwithstanding this development, Erdoğan informed Trump on October 6 of Turkey's intention to invade northeastern Syria.<sup>6</sup> The White House press secretary summarized the phone call as follows:

Turkey will soon be moving forward with its long-planned operation into Northern Syria. The United States Armed Forces will not support or be involved in the operation, and United States forces, having defeated the [ISIL] territorial "Caliphate," will no longer be in the immediate area . . . . Turkey will now be responsible for all [ISIL] fighters in the area captured over the past two years in the wake of the defeat of the territorial "Caliphate" by the United States.<sup>7</sup>

The next morning, Trump tweeted his wish to "get out of these ridiculous Endless Wars . . . and bring our soldiers home" and stated that other actors in the region would "have to figure the situation out."<sup>8</sup> Trump's tacit acceptance of Turkey's planned advance into northern Syria and his promise to "get out" of the area drew sharp criticism from former Trump administration officials, congressional leaders, and European allies.<sup>9</sup> Within a week, the U.S. House of Representatives passed a resolution expressing opposition to Trump's decision by a vote of 354 to 60.<sup>10</sup> Kurdish leaders, including Syrian Democratic Forces commander General Mazloum Kobane Abdi, responded to their abandonment by U.S. allies with dismay.<sup>11</sup>

On October 9, Turkey launched its offensive into northeastern Syria, conducting air strikes and sending ground troops across the border.<sup>12</sup> Turkey informed the UN Security Council by letter that it was invoking its right to self-defense under Article 51 of the UN Charter to "target terrorists and their hideouts, shelters, emplacements, weapons, vehicles

<sup>5</sup> Sarah El Deeb, *Turkey, US Conduct "Safe Zone" Joint Patrols in North Syria*, AP NEWS (Sept. 8, 2019), at <https://apnews.com/b6e7c9b282844b92bed9a2e5bc7703d9>.

<sup>6</sup> White House Press Release, Statement from the Press Secretary (Oct. 6, 2019), at <https://www.whitehouse.gov/briefings-statements/statement-press-secretary-85> [<https://perma.cc/4SS8-WTQC>].

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

<sup>8</sup> Donald J. Trump (@realDonaldTrump), TWITTER (Oct. 7, 2019, 7:40 AM), at <https://twitter.com/realDonaldTrump/status/1181172457811697664> [<https://perma.cc/XH8R-FLC3>].

<sup>9</sup> See Peter Baker & Lara Jakes, *Trump Throws Middle East Policy Into Turmoil Over Syria*, N.Y. TIMES (Oct. 7, 2019), at <https://www.nytimes.com/2019/10/07/us/politics/turkey-syria-trump.html>; James McAuley & Rick Noack, *Withdrawal of U.S. Troops from Northern Syria Angers, Worries Europeans*, WASH. POST (Oct. 7, 2019), at [https://www.washingtonpost.com/world/europe/trumps-pullout-of-us-troops-from-northern-syria-angers-worries-europeans/2019/10/07/7a2c89f2-e8fe-11e9-85c0-85a098e47b37\\_story.html](https://www.washingtonpost.com/world/europe/trumps-pullout-of-us-troops-from-northern-syria-angers-worries-europeans/2019/10/07/7a2c89f2-e8fe-11e9-85c0-85a098e47b37_story.html); Eric Schmitt, Maggie Haberman & Edward Wong, *President Endorses Turkish Military Operation in Syria, Shifting U.S. Policy*, N.Y. TIMES (Oct. 7, 2019), at <https://www.nytimes.com/2019/10/07/us/politics/trump-turkey-syria.html>.

<sup>10</sup> H.R.J. Res. 77, 116th Cong. (2019).

<sup>11</sup> Liz Sly, Sarah Dadouch & Asser Khattab, *Syrian Kurds See American Betrayal and Warn Fight Against ISIS Is Now in Doubt*, WASH. POST (Oct. 7, 2019), at [https://www.washingtonpost.com/world/middle\\_east/syrian-kurds-see-american-betrayal-and-warn-alliance-against-isis-is-now-in-doubt/2019/10/07/96c425da-e902-11e9-a329-7378fbfa1b63\\_story.html](https://www.washingtonpost.com/world/middle_east/syrian-kurds-see-american-betrayal-and-warn-alliance-against-isis-is-now-in-doubt/2019/10/07/96c425da-e902-11e9-a329-7378fbfa1b63_story.html) (also quoting a statement from Syrian Kurdish leaders that "[t]o disregard our partnership would also send a clear signal to all would-be partner forces of the United States that a U.S. alliance may not be trustworthy").

<sup>12</sup> *Turkey-Syria Border: All the Latest Updates*, AL JAZEERA (Oct. 10, 2019), at <https://www.aljazeera.com/news/2019/10/turkey-syria-border-latest-updates-191008131745495.html>.

and equipment” and that, consistent with previous counter-terrorism operations, “Turkey’s response will be proportionate, measured and responsible.”<sup>13</sup>

In an unconventional diplomatic letter dated the same day, Trump wrote to Erdoğan as follows:

Let’s work out a good deal! You don’t want to be responsible for slaughtering thousands of people, and I don’t want to be responsible for destroying the Turkish economy—and I will . . . .

I have worked hard to solve some of your problems. Don’t let the world down. You can make a great deal. General Mazloum is willing to negotiate with you, and he is willing to make concessions that they would never have made in the past . . . .

History will look upon you favorably if you get this done the right and humane way. It will look upon you forever as the devil if good things don’t happen. Don’t be a tough guy. Don’t be a fool!<sup>14</sup>

In response to the Turkish offensive, Trump signed an executive order on October 14 that authorized significant sanctions against individuals and entities within the Turkish government involved in this offensive.<sup>15</sup> The order also authorized secondary sanctions on foreign banks doing business with such individuals or entities.<sup>16</sup> That same day, the Department of the Treasury designated two ministries and three senior Turkish government officials as subject to these sanctions.<sup>17</sup> The Treasury secretary stated that “[t]he United States is holding the Turkish Government accountable for escalating violence by Turkish forces, endangering innocent civilians, and destabilizing the region.”<sup>18</sup> Separately, on October 15, the Department of Justice indicted Halkbank, a Turkish state-owned bank, on fraud and money laundering charges relating to the evasion of U.S. sanctions on Iran.<sup>19</sup>

<sup>13</sup> Letter Dated 9 October 2019 from the Permanent Representative of Turkey to the United Nations Addressed to the President of the Security Council, UN Doc. S/2019/804, at <https://undocs.org/S/2019/804>. The European Parliament passed a resolution describing Turkey’s actions as “a grave violation of international law” that “is undermining the stability and security of the region as a whole, bringing further suffering to people already affected by war, causing the mass displacement of civilians, and could contribute to the re-emergence of [ISIL].” Resolution on the Turkish Military Operation in Northeast Syria and Its Consequences, Eur. Parl. Doc. 2886(RSP) (2019), at [http://www.europarl.europa.eu/doceo/document/RC-9-2019-0123\\_EN.html](http://www.europarl.europa.eu/doceo/document/RC-9-2019-0123_EN.html).

<sup>14</sup> *Read Trump’s Letter to President Erdoğan of Turkey*, N.Y. TIMES (Oct. 16, 2019), at <https://www.nytimes.com/interactive/2019/10/16/us/politics/trump-letter-turkey.html>. That same day, Trump stated that the United States was relocating “some of the most dangerous [detained ISIL] fighters” out of the area. Donald J. Trump, Remarks by President Trump at Signing of Executive Orders on Transparency in Federal Guidance and Enforcement, 2019 DAILY COMP. PRES. DOC. NO. 705, at 7 (Oct. 9).

<sup>15</sup> Exec. Order No. 13,894, 84 Fed. Reg. 55,851 (Oct. 14, 2019).

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

<sup>17</sup> U.S. Dep’t of Treasury Press Release, Treasury Designates Turkish Ministries and Senior Officials in Response to Military Action in Syria (Oct. 14, 2019), at <https://home.treasury.gov/news/press-releases/sm792> [<https://perma.cc/NU5X-QULW>].

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

<sup>19</sup> U.S. Dep’t of Justice Press Release, Turkish Bank Charged in Manhattan Federal Court for Its Participation in a Multibillion-Dollar Iranian Sanctions Evasion Scheme (Oct. 15, 2019), at <https://www.justice.gov/opa/pr/turkish-bank-charged-manhattan-federal-court-its-participation-multibillion-dollar-iranian> [<https://perma.cc/34FZ-XDF7>].

Also in response to the Turkish offensive, Kurdish forces reached a deal with the Russian-backed Syrian government on October 13 that would allow government forces to return to northeastern Syria to combat Turkish military advances.<sup>20</sup> Filling the vacuum left by the U.S. withdrawal, Syrian government forces immediately moved in, along with Russian troops.<sup>21</sup>

On October 17, Vice President Pence led a delegation to Ankara, Turkey, in an attempt to negotiate a ceasefire with Erdoğan. After several hours of diplomatic discussions, Turkey agreed to a five-day ceasefire.<sup>22</sup> The United States and Turkey issued a joint statement following the meeting that outlined a thirteen-point agreement.<sup>23</sup> This agreement included the following:

1. The US and Turkey reaffirm their relationship as fellow members of NATO. The US understands Turkey's legitimate security concerns on Turkey's southern border.  
...
4. The two countries reiterate their pledge to uphold human life, human rights, and the protection of religious and ethnic communities.  
...
7. The Turkish side expressed its commitment to ensure safety and well-being of residents of all population centers in the safe zone controlled by the Turkish Forces (safe zone) and reiterated that maximum care will be exercised in order not to cause harm to civilians and civilian infrastructure.  
...
10. The safe zone will be primarily enforced by the Turkish Armed Forces and the two sides will increase their cooperation in all dimensions of its implementation.
11. The Turkish side will pause Operation Peace Spring in order to allow the withdrawal of [certain Syrian Kurdish forces] from the safe zone within 120 hours. Operation Peace Spring will be halted upon completion of this withdrawal.
12. Once Operation Peace Spring is paused, the US agrees not to pursue further imposition of sanctions under the Executive Order of October 14, 2019 . . . . Once Operation Peace Spring is halted as per paragraph 11 the current sanctions under the aforementioned Executive Order shall be lifted.<sup>24</sup>

Five days later, on October 22, Erdoğan and Russian President Vladimir Putin reached an agreement that their forces would share supervision over a strip of territory more than twenty

<sup>20</sup> Ben Hubbard, Charlie Savage, Eric Schmitt & Patrick Kingsley, *Abandoned by U.S. in Syria, Kurds Find New Ally in American foe*, N.Y. TIMES (Oct. 13, 2019), at <https://www.nytimes.com/2019/10/13/world/middleeast/syria-turkey-invasion-isis.html>.

<sup>21</sup> Ben Hubbard, Charlie Savage, Eric Schmitt & Patrick Kingsley, *In Syria, Russia Is Pleased to Fill an American Void*, N.Y. TIMES (Oct. 15, 2019), at <https://www.nytimes.com/2019/10/15/world/middleeast/kurds-syria-turkey.html>.

<sup>22</sup> Annie Karni, Lara Jakes & Patrick Kingsley, *Turkey Agrees to Pause Fighting, but Not to Withdraw Forces from Northern Syria*, N.Y. TIMES (Oct. 17, 2019), at <https://www.nytimes.com/2019/10/17/world/middleeast/trump-turkey-invasion-syria.html>.

<sup>23</sup> White House Press Release, *The United States and Turkey Agree to Ceasefire in Northeast Syria* (Oct. 17, 2019), at <https://www.whitehouse.gov/briefings-statements/united-states-turkey-agree-ceasefire-northeast-syria> [<https://perma.cc/Z3DK-7LX2>].

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



miles wide running hundreds of miles along Syria's northeastern border.<sup>25</sup> The next day, Trump announced a "permanent" ceasefire by Turkey:

Early this morning, the government of Turkey informed my administration that they would be stopping combat and their offensive in Syria, and making the ceasefire permanent. And it will indeed be permanent. However you would also define the word "permanent" in that part of the world as somewhat questionable, we all understand that. But I do believe it will be permanent.<sup>26</sup>

Trump accordingly instructed the secretary of the Treasury "to lift all sanctions imposed on October 14 in response to Turkey's original offensive moves against the Kurds in Syria's northeast border region."<sup>27</sup> Trump stated that this ceasefire "validates our course of action with Turkey that only a couple of weeks ago were scorned . . ."<sup>28</sup> He also made clear that "a small number of U.S. troops will remain in the area where they have the oil. And we're going to be protecting it, and we'll be deciding what we're going to do with it in the future."<sup>29</sup>

Several days later, Trump announced one further, significant development stemming from U.S. military operations in Syria. This was the death of ISIL leader Abu Bakr al-Baghdadi,<sup>30</sup> who died during a raid conducted by U.S. forces in northwestern Syria. Prior to this operation, Kurdish allies had tracked al-Baghdadi and provided information critical to the launch of the attack.<sup>31</sup> Although a spokesperson for the Kremlin declined to reveal whether the United States had informed Russia of the operation in advance,<sup>32</sup> Trump observed that "[w]e had to fly over certain Russia areas, Russia-held areas" and "Russia treated us great."<sup>33</sup>

On November 13, Erdoğan met with Trump at the White House.<sup>34</sup> At a joint press conference with Erdoğan, Trump stated:

<sup>25</sup> Kareem Fahim, Karen DeYoung & Missy Ryan, *Russia and Turkey Reach Deal to Push Kurdish Forces Out of Zone in Northern Syria*, WASH. POST (Oct. 22, 2019), at [https://www.washingtonpost.com/world/middle\\_east/turkeys-erdogan-meets-with-putin-in-russia-to-discuss-syrian-operation/2019/10/22/764abcea-f43f-11e9-b2d2-1f37c9d82dbb\\_story.html](https://www.washingtonpost.com/world/middle_east/turkeys-erdogan-meets-with-putin-in-russia-to-discuss-syrian-operation/2019/10/22/764abcea-f43f-11e9-b2d2-1f37c9d82dbb_story.html). For an informative graphic detailing the changes in control over northern Syria during this short period, see Allison McCann, Anjali Singhvi & Jeremy White, *How the New Syria Took Shape*, N.Y. TIMES (Oct. 30, 2019), at <https://www.nytimes.com/interactive/2019/10/30/world/middleeast/syria-turkey-maps.html>.

<sup>26</sup> White House Press Release, Remarks by President Trump on the Situation in Northern Syria (Oct. 23, 2019), at <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-situation-northern-syria/> [<https://perma.cc/M2KP-74VB>].

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

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

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

<sup>30</sup> White House Press Release, Statement from the President on the Death of Abu Bakr al-Baghdadi (Oct. 27, 2019), at <https://www.whitehouse.gov/briefings-statements/statement-president-death-abu-bakr-al-baghdadi> [<https://perma.cc/YD4E-CWFC>].

<sup>31</sup> Ben Hubbard & Eric Schmitt, *As Kurds Tracked ISIS Leader, U.S. Withdrawal Threw Raid into Turmoil*, N.Y. TIMES (Oct. 28, 2019), at <https://www.nytimes.com/2019/10/28/world/middleeast/isis-kurds-baghdadi.html>.

<sup>32</sup> Humeyra Pamuk & Andrew Osborn, *U.S. Wants to Bolster Fight Against Islamic State After Its Leader's Death*, REUTERS (Oct. 28, 2019), at <https://www.reuters.com/article/us-mideast-crisis-baghdadi/u-s-wants-to-bolster-fight-against-islamic-state-after-its-leaders-death-idUSKBN1X71DY>.

<sup>33</sup> White House Press Release, Remarks by President Trump on the Death of ISIS Leader Abu Bakr al-Baghdadi (Oct. 27, 2019), at <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-death-isis-leader-abu-bakr-al-baghdadi> [<https://perma.cc/2DGA-U7YS>].

<sup>34</sup> White House Press Release, Remarks by President Trump and President Erdoğan of Turkey in Joint Press Conference (Nov. 13, 2019), at <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-president-erdogan-turkey-joint-press-conference> [<https://perma.cc/FZ2C-LMG3>].

Today, the ceasefire continues to hold. And I want to thank the President for his partnership and cooperation as we work to build a more stable, and peaceful, and prosperous Middle East. We've assured each other that Turkey will continue to uphold what it's supposed to uphold. I'm a big fan of the President, I have to tell you that. And I know that the ceasefire, while complicated, is moving forward and moving forward at a very rapid clip. There's a lot of people that want to see that work after so many decades and so many centuries, you might say.<sup>35</sup>

In his remarks, Erdoğan noted his plans to repatriate one million Syrian refugees into the safe zone.<sup>36</sup> Erdoğan had met several weeks earlier with UN Secretary-General António Guterres to discuss this issue, and Guterres “stressed the basic principles relating to the voluntary, safe and dignified” return of refugees.<sup>37</sup> The United Nations High Commissioner for Refugees is in the process of reviewing Erdoğan's plan,<sup>38</sup> which would involve settling Arab Syrians from other regions within Syria into the largely Kurdish northeast.<sup>39</sup> In early November, a senior UN humanitarian advisor indicated that “localized heavy fighting continues” in northeastern Syria, where “recent displacements are compounding an already dire situation in which some 710,000 people were already displaced and approximately 1.8 million remain in need of humanitarian assistance.”<sup>40</sup>

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

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

<sup>37</sup> UN Sec'y-Gen. Press Release, Readout of the Secretary-General's Meeting with H.E. Mr. Recep Tayyip Erdoğan, President of Turkey (Nov. 1, 2019), at <https://www.un.org/sg/en/content/sg/readout/2019-11-01/readout-of-the-secretary-general%E2%80%99s-meeting-he-mr-recep-tayyip-erdogan-president-of-turkey>.

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

<sup>39</sup> See Dominic Evans, *Turkey's Plan to Settle Refugees in Northeast Syria Alarms Allies*, REUTERS (Oct. 8, 2019), at <https://www.reuters.com/article/us-syria-security-turkey-refugees-graphi/turkeys-plan-to-settle-refugees-in-northeast-syria-alarms-allies-idUSKBN1WN28J> (noting widespread skepticism regarding this plan); see also Lama Fakih, *Turkey's "Safe Zone" Would Be Anything But*, HUM. RTS. WATCH (Oct. 11, 2019), at <https://www.hrw.org/news/2019/10/11/turkeys-safe-zone-would-be-anything> (stating that “Turkey's plan to create a 32-kilometer ‘safe zone’ in Syria where it could relocate one million Syrian refugees is woefully misguided and dangerous—and bound to fail”).

<sup>40</sup> *Thursday's Daily Brief: DR Congo Warlord Sentenced, Iraq Protest Latest, UN Food Outlook Report, Syrian Humanitarian Update, Tech and the Food Chain*, UN NEWS (Nov. 7, 2019), at <https://news.un.org/en/story/2019/11/1050921>.